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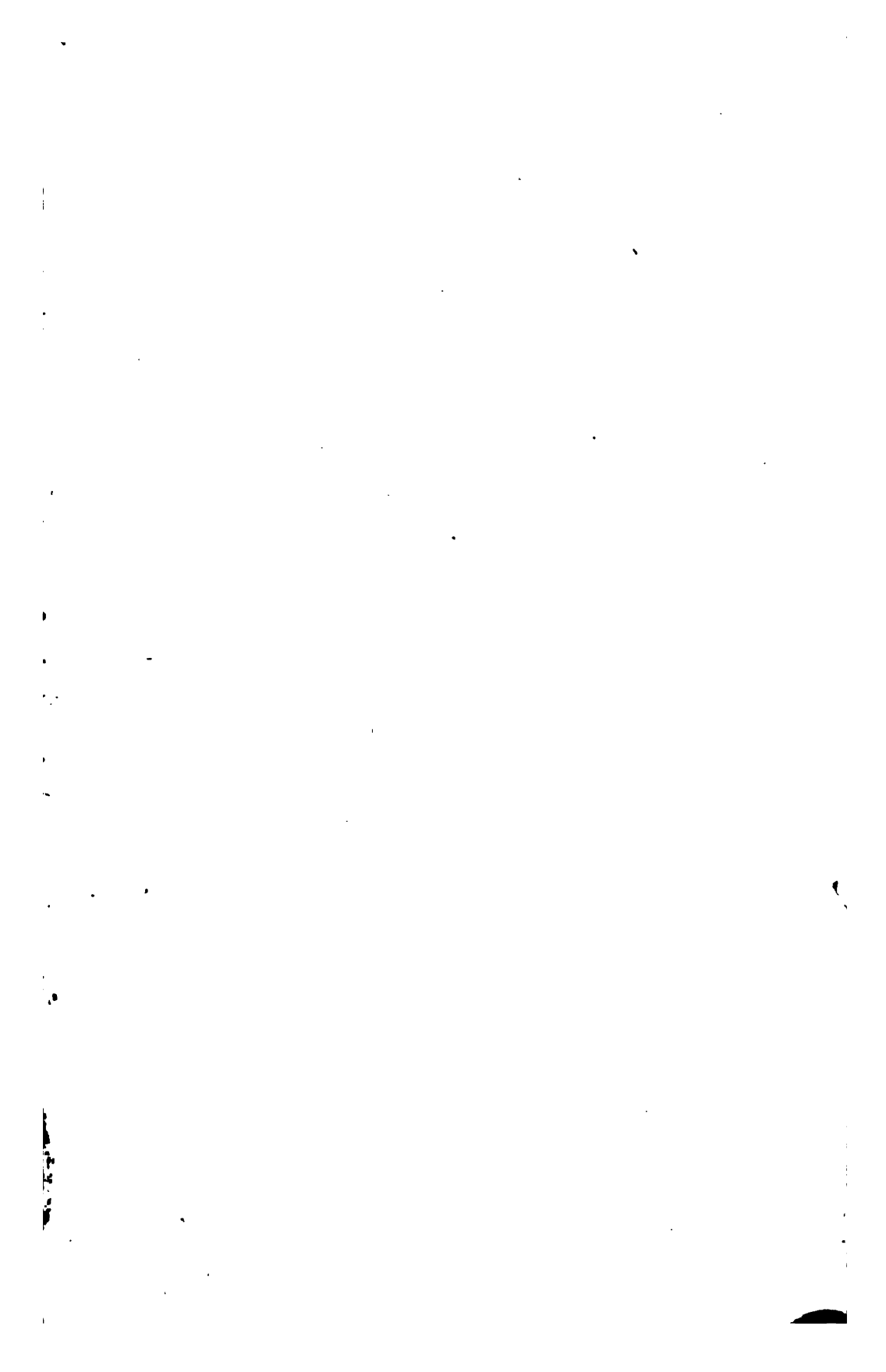


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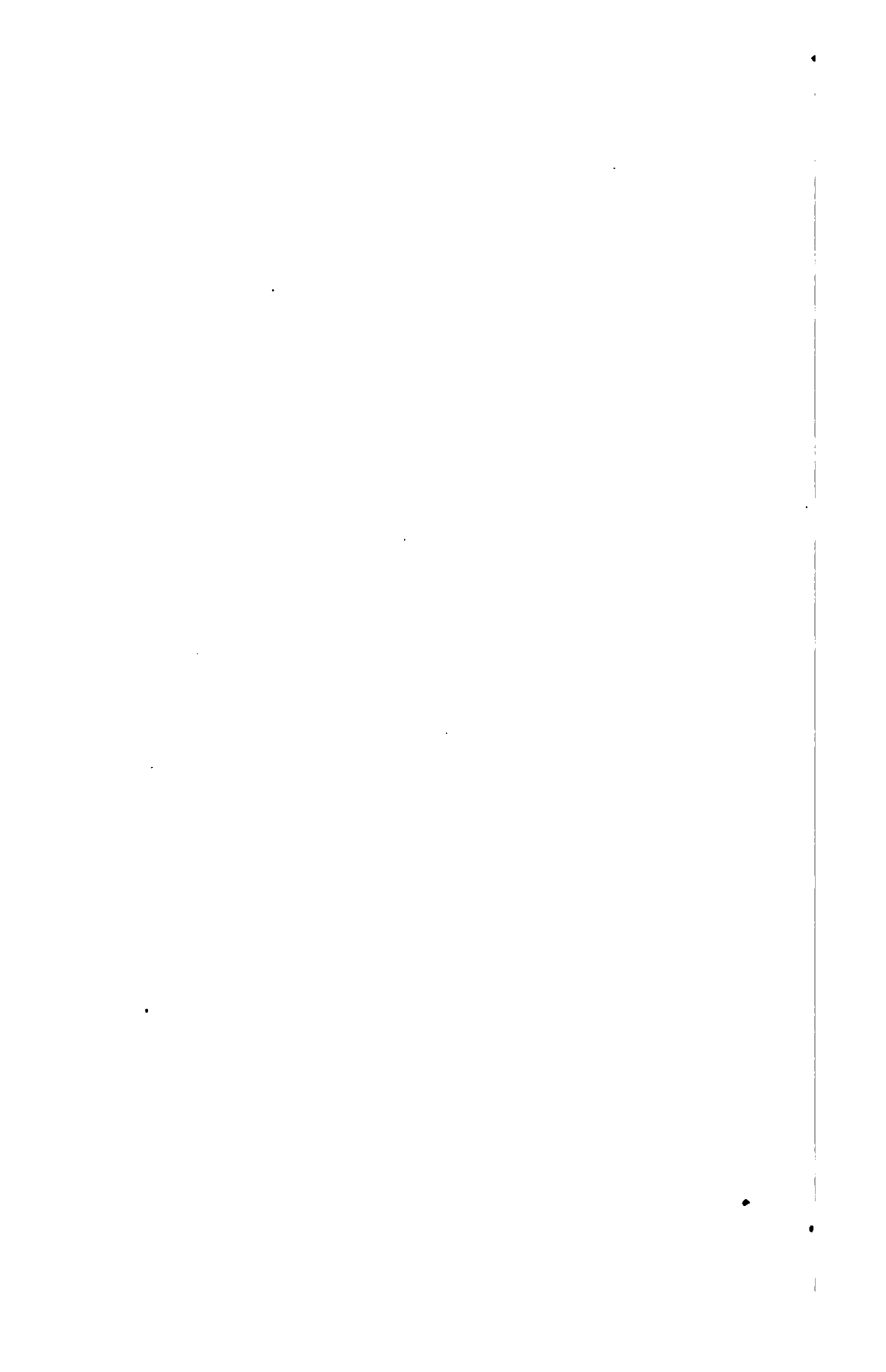
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 105,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM E. NIBLACK. *†
HON. GEORGE V. HOWK. †
HON. BYRON K. ELLIOTT. †
HON. ALLEN ZOLLARS. †
HON. JOSEPH A. S. MITCHELL. §

*Chief Justice at the November Term, 1885.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 3d, 1881.

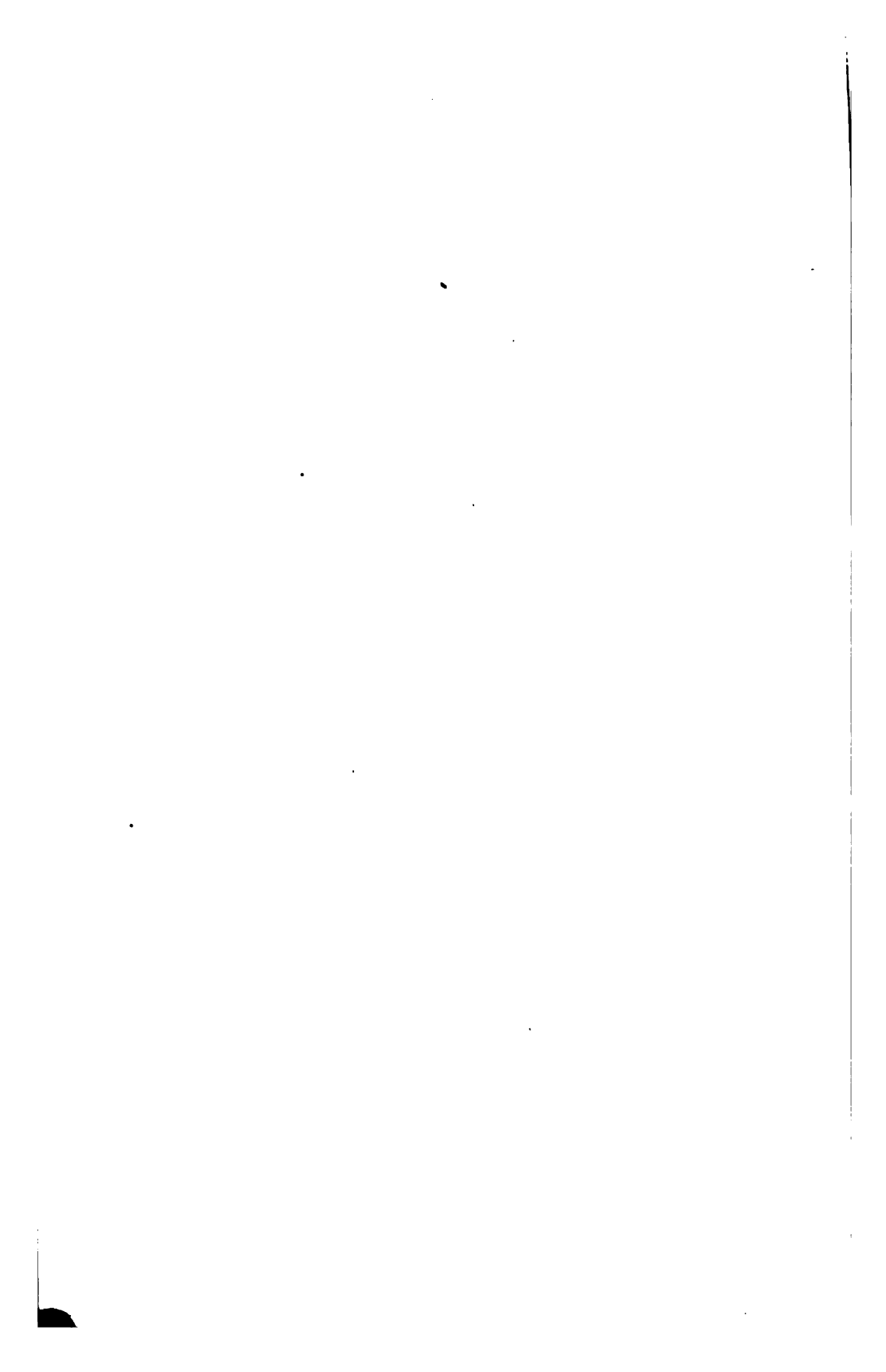
§Term of office commenced January 6th, 1885.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1885, IN THE SEVEN-
TIETH YEAR OF THE STATE.

No. 12,647.

STRONG v. THE STATE.

CRIMINAL LAW.—*Forcible Entry and Detainer.—Affidavit, Sufficiency of.*—An affidavit charging a defendant with having at, etc., on, etc., unlawfully, violently and forcibly entered into certain premises, “to wit, a certain store-room situate on Main street, in the town of A., in said county and State, and then and there being in the possession of one S.,” and with having unlawfully, violently and forcibly expelled the said S. from, and put him out of, the possession of said store-room, and with having in like manner kept him out of the possession thereof, sufficiently describes the premises.

SAME.—*Amendment of Affidavit on Appeal.—Practice.*—If an affidavit, filed before a justice of the peace, can be amended at all on appeal, it can only be by interlineation of and swearing anew to the original, or by the substitution of a new affidavit in its stead.

SAME.—*Forcible Entry and Detainer.—Proof, what Sufficient.*—In a prosecution for forcible entry and detainer under section 1972, R. S. 1881, proof of such strong-handed proceedings, or such a show of force, as over-

105	1
141	123
105	1
145	566
105	1
148	704
149	709
150	85
105	1
157	445
105	1
161	380

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awed and intimidated the injured party, and as either deterred him from defending his possession, or coerced him into surrendering it, is sufficient to make out a case of forcible entry, and proof of a similar exhibition of force is all that is required to sustain a charge of forcible detainer.

SAME.—Where the charge is for both a forcible entry and a forcible detainer, the party charged may be found guilty of one and acquitted of the other.

From the Fulton Circuit Court.

M. L. Essick and *O. F. Montgomery*, for appellant.

F. T. Hord, Attorney General, *E. C. Martindale*, Prosecuting Attorney, *W. B. Hord* and *G. W. Holman*, for the State.

NIBLACK, C. J.—This was a prosecution against Andrew Strong, the appellant, commenced before a justice of the peace of Fulton county, and based upon an affidavit filed by Miss Mattie Smith charging him with having, on the 19th day of May, 1885, unlawfully, violently and forcibly entered into certain premises, “to wit, a certain store-room situate on Main street, in the town of Akron, in said county and State, and then and there being in the possession of said Mattie Smith,” and with having unlawfully, violently and forcibly expelled the said Mattie Smith from, and put her out of the possession of, said store-room, and with having in like manner kept her out of the possession thereof.

The appellant was adjudged by the justice to be guilty as charged, and upon an appeal to the circuit court the parties appeared, and the prosecuting attorney asked leave to amend the affidavit, which was granted, and thereupon he filed what is claimed to have been amendments to the affidavit, as follows:

“Comes now the State, by *Elijah C. Martindale*, prosecuting attorney, and moves the court to amend the affidavit filed in this cause by inserting the word ‘on’ at the end of line number ten, the following, to wit: ‘The north half of lot number fifty-six (56), and occupied by said Mattie Smith,’”

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and by inserting immediately after the words 'store-room,' on line ten, the following words, to wit, 'and dwelling.'

"MATTIE SMITH.

"E. C. MARTINDALE, Pros. Att'y.

"Subscribed and sworn to before me this 9th day of September, 1885. ISAIAH WALKER, F. C. C."

A motion to strike this paper from the files being first overruled, the appellant moved to quash the affidavit, and that motion was in like manner overruled. There was then a trial, a verdict finding the appellant guilty of the offence charged, and a judgment of conviction accordingly.

We do not regard the paper filed as above, and purporting to amend the affidavit in certain respects, as amounting to an actual amendment of that document. The amendments which the prosecuting attorney evidently intended to make were such as could only have been made, if at all under our practice, by an interlineation of, and swearing anew to, the original affidavit, or by the substitution of a new affidavit in its stead. The question of the power of a circuit court to authorize the affidavit to be amended in a case like this, is not, therefore, now properly before us. It may not, nevertheless, be out of place to remark that if a circuit court possesses such a power, which we regard as exceedingly doubtful, it inheres in the court, and rests upon general principles, since section 1735, R. S. 1881, cited by counsel, plainly has reference to another class of cases. Consequently, this case must now be considered as having been tried, and as still standing, upon the original affidavit. On the subject of the amendment of affidavits and verified complaints filed before justices of the peace, see Moore Crim. Law, section 84, and authorities cited; 1 Bishop Crim. Proc., sections 234, 714, 721; Bassett Crim. Pl. 131, 132.

No objection to the original affidavit has been either suggested or intimated, and hence there is no question before us as to its sufficiency. Its description of the premises was, at any rate, quite sufficient in a case like this, where restitution

Strong v. The State.

was neither demanded nor contemplated. 2 Bishop Crim. Proc., sections 381, 382.

There was evidence tending to show that the prosecuting witness entered into the possession of the store-room in question in November, 1884, under some kind of an arrangement with the appellant for the purchase of it, but failing to consummate the arrangement for its purchase, she rented the building of the appellant until the 1st day of January, then next ensuing; that after that date the prosecuting witness continued in possession on some terms, or in some way, not fully explained, until some time in March, 1885, when the appellant informed her that after the 5th day of April, 1885, the building would go into the hands of his wife and one Curtis, and that if she wished to rent the building after that date she would have to arrange with them about it; that the prosecuting witness continued in possession as before, using all the while the front-room for a millinery establishment, and the back-room for a private apartment; that some time in May following the appellant claimed that the prosecuting witness owed thirteen dollars back rent, which she declined to pay; that late in the afternoon of the 19th day of that month, the appellant went to the building and finding the front door open entered the front-room, and engaged in an excited and angry conversation with the prosecuting witness as to the condition of the building and her refusal to pay the rent which he insisted was due; that seeing the key in the front door he took it into his possession, and saying, that as he then had the key he would lock the door if she did not pay the rent demanded, went away with the key; that returning a short time afterwards, and finding the prosecuting witness temporarily absent, the appellant procured a hatchet and some nails and nailed up the back door and the windows, and, locking the front door, again took the key away with him; that the prosecuting witness soon afterwards returned, but was unable to get into the building; that while she was afterwards permitted temporarily to re-enter the building and

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to have some access to her property inside, neither the key to, nor the possession of, the room was fully restored to her until after the commencement of this prosecution.

A question was made below, and is still urged here, upon the sufficiency of the evidence to support the verdict.

Section 1972, R. S. 1881, enacts that "Whoever violently takes or keeps possession of any lands, with menaces, force, and arms, and without authority of law, is guilty of forcible entry or forcible detainer, as the case may be, and, upon conviction, shall be fined not exceeding one thousand dollars."

It is not necessary that the violence contemplated by this section of the statute shall be manifested by menaces, as well as by force and with arms, all as parts of the same transaction. Neither is actual force an essential requisite. Proof of such strong-handed proceedings, or such a show of force, as overawed and intimidated the injured party, and as either deterred him from defending his possession, or coerced him into surrendering it, is sufficient to make out a case of forcible entry, and proof of a similar exhibition of force is all that is required to sustain a charge of forcible detainer. Moore Crim. Law, section 749; Whart. Crim. Law, section 1094.

Where the charge is for both a forcible entry and a forcible detainer, the party charged may be found guilty of the one and acquitted of the other. 2 Bishop Crim. Proc., section 388; Whart. Crim. Ev., section 129.

Waiving all questions as to the manner in which the appellant entered the house in controversy, both when he went in and got the key, and when he entered with hatchet and nails, with the assistance of the key, the evidence showed the appellant to have been, at least, technically guilty of a forcible detainer of the building, and as the jury only assessed a merely nominal fine of one dollar against him, he has no cause to complain that the verdict was not supported by the evidence.

Questions were also made below, and are still pressed here,

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upon certain instructions given, as well as others refused, by the circuit court. We have examined all of the instructions given, as well as refused, and feel quite assured that if any error was committed either in giving or refusing instructions the error was merely abstract, and hence harmless, and that there is no reason for a reversal of the judgment upon the instructions, as the verdict was right upon the evidence. Section 1891, R. S. 1881. Many of the cases cited by counsel on both sides were civil actions for forcible entry and detainer, and are for that reason not applicable in all respects to criminal prosecutions like the one in hearing; but, on the general subject, see *Cunningham Forcible Entry and Detainer*, 31, *et seq.*; *Bell v. Longworth*, 6 Ind. 273; *Archey v. Knight*, 61 Ind. 311; *Tibbetts v. O'Connell*, 66 Ind. 171; *Vess v. State*, 93 Ind. 211.

The judgment is affirmed, with costs.

Filed Jan. 19, 1886.

No. 11,642.

VAIL, EXECUTOR, ET AL. v. RINEHART.

PLEADING.—*Plea in Abatement.*—*Demurrer.*—*Motion to Reject.*—An objection to a plea in abatement, that it has not been verified, does not render it bad on demurrer, and can only be reached by a motion to reject the plea or strike it from the files.

EVIDENCE.—*Transcript.*—*Certificate of Clerk.*—The certificate of a clerk of the circuit court, which certifies, over the proper signature and the seal of such court, "that the above and foregoing is a full, true and complete copy and transcript of proceedings had and papers filed in said matter, as fully as the same appears of record and from the files of said court, in my office remaining," is sufficient in form and substance to render all matters set forth in such transcript competent evidence for whatever it may be worth or tend to prove.

DECEDENTS' ESTATES.—*Petition of Administrator to Sell Real Estate.*—*Jurisdiction.*—The circuit court which issues letters testamentary, or letters

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of administration upon the estate of a decedent, has exclusive jurisdiction of a petition for the sale of the decedent's real estate, in whatever county the same may be situate, to make assets for the payment of the liabilities of such decedent's estate.

SAME.—*Parties to Administrator's Petition.*—*Defences to Petition.*—*Conclusiveness of Judgment.*—*Former Adjudication.*—Where a person who holds a lien for taxes and improvements on the real estate of a decedent is made a party defendant to a petition filed by the administrator for the sale of such real estate to pay debts, and is properly served with summons, and when such party fails to set up or assert any claim to such lands, or any lien thereon, and judgment is rendered on such petition ordering the sale of the decedent's lands, without providing in any way for the protection or payment of the lien of such defendant, such judgment is a final determination against him, not only as to what was actually decided therein, but also as to every other matter which the parties might have litigated in the case, and he can not, in an action subsequently commenced, enforce such lien.

From the Pulaski Circuit Court.

D. Turpie, G. Burson and R. L. Mattingly, for appellants.
S. P. Thompson, for appellee.

Howk, J.—On the 29th day of June, 1883, appellee, Rinehart, as sole plaintiff, commenced this action against the appellants, Benjamin F. Vail, executor of the last will of Sarah A. Vail, deceased, Kate H. Root and Deloss Root, James N. Huston, administrator of the estate of William Huston, deceased, and surviving partner of the firm of James N. & Wm. Huston, William B. Shepherd and Hugh Dickey, as defendants.

In his complaint the appellee alleged that on the 9th day of February, 1874, Nathan S. and David H. Hazen purchased at public auction from the treasurer of Pulaski county, at the annual sales of lands for taxes delinquent thereon, certain lands, particularly described, in such county; that on the 16th day of February, 1876, Nathan S. Hazen purchased of the treasurer of such county, at public auction, at the annual sale of lands for taxes due and delinquent thereon, certain other lands, particularly described, in Pulaski county; that at the times such taxes were assessed, the lands described were sub-

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ject to taxation, and were duly listed and assessed for taxation; that such taxes, at the times of such sales, were due, delinquent and wholly unpaid; that when the two years allowed by law for the redemption of such lands by the owner thereof had expired, the auditor of Pulaski county executed tax deeds to Hazen and Hazen, and Nathan S. Hazen, in due form; and Hazen and Hazen, and Nathan S. Hazen, then and there surrendered to such auditor the certificates of sale, issued to them at the dates of such sales by the treasurer of such county. Copies of such tax deeds were filed with, and made parts of, appellee's complaint.

And appellee said that by deed from Hazen and Hazen he held all their right and title to the lands described, and, by virtue of such deed, he owned and held the lien for such taxes and interest, and for the improvements thereafter mentioned; that appellee and the Hazens had paid all the taxes against the lands described since the same were sold as aforesaid; that the taxes so paid, and the purchase-money paid for the lands at such sales thereof, amounted to one thousand dollars, and the interest thereon amounted to fifteen hundred dollars. Copies of such tax receipts were filed with the complaint, as parts thereof. And appellee averred that he had made lasting and valuable improvements on the lands described, by ditching and fencing the same, which were reasonably worth to such lands and enhanced their value one thousand dollars, which had not been, nor any part thereof, paid or tendered him by any person; that appellant Kate H. Root was the owner of such lands, and Deloss Root was her husband, and held a mortgage on the lands; and that each and all the other appellants claimed some interest in such lands by way of mortgage or other lien thereon, except appellant Benjamin F. Vail, executor, etc., of Sarah A. Vail, deceased, who claimed an interest in the lands, because they were the property of his testatrix at the time of her death, and were liable to be made assets for the payment of the debts of her estate. And appellee averred that the claims and liens

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of all the appellants were subject and subsequent to his liens for taxes, and he demanded judgment for four thousand dollars, and the sale of such lands for the payment thereof, and for all other proper relief.

Answers and replies were filed, putting the cause at issue, and, upon final hearing had, the court found for appellee in the sum of \$2,126.92, and ordered that such sum, with interest and costs, be paid into court for the use of appellee, within ninety days from the date of the decree; and that, in default of such payment, the lands should be sold, etc. Before the hearing, the suit was dismissed as to the defendant Huston, and the defendant Shepherd made default.

The only error assigned here by the appellants is the overruling of their motion for a new trial. Under this error the rulings chiefly complained of by appellants' learned counsel related to the exclusion of offered evidence tending to sustain the special paragraphs of appellants' answers, to which the appellee's demurrers had been overruled by the court. There is a marked incongruity, we think, between the rulings of the circuit court upon the demurrers to the special paragraphs of answer and its rulings in the exclusion of offered evidence. This may be accounted for, to some extent, at least, by the fact apparent in the record, that, during the progress of the cause in the trial court, there was a change in the judges of the court. But whatever may have been the cause of these inconsistent rulings, it seems clear that some of such rulings must be erroneous.

Cross errors have been assigned by appellee which call in question (1) the overruling of his demurrer to the third paragraph of the answer of appellants Benjamin F. Vail and Kate H. Root, and (2) in overruling his demurrer to the second and third paragraphs of the separate answer of Kate H. Root, "if the same be in the record." Before considering any of the questions arising under the error assigned by the appellants, it seems to us that, in the natural order of things, we should first dispose of the cross errors, of which appellee

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complains, especially so, because it is manifest that if the paragraphs of answer mentioned in such cross errors should be held bad on demurrer, the rulings of the trial court, in the exclusion of evidence offered to sustain such paragraphs, if erroneous, would be at most harmless errors. Therefore we will first consider and decide the questions presented by appellee's cross errors in the order of their statement.

In the third paragraph of their answer, the appellants Benjamin F. Vail and Kate H. Root alleged that on the 4th day of December, 1882, the appellant Vail, as administrator with the will annexed of Sarah A. Vail, deceased, filed his petition in the circuit court of Dearborn county, Indiana, in which county his decedent, Sarah A. Vail, resided at the time of her death, and wherein letters of administration were granted him on her estate; that the purpose of such petition, as stated therein, under the oath of such administrator, was to sell his decedent's real estate to make assets for the payment of the debts of her estate; that the real estate in Pulaski county, mentioned in appellee's complaint herein, was a portion of the real estate described in such administrator's petition; that one of the defendants in such petition was Enoch Rinehart, the plaintiff in this cause; that Enoch Rinehart was personally served with process issued on such petition, and appeared thereto; and that such proceedings were thereupon had as that afterwards, to wit, on the 6th day of September, 1883, the Dearborn Circuit Court found and adjudged that Enoch Rinehart had no interest, claim, right or title to or in the lands mentioned in his complaint herein, and that the same should be sold for the payment of the debts mentioned in such petition; that on the 29th day of June, 1883, and during the pendency of the aforesaid petition against him in the Dearborn Circuit Court, Enoch Rinehart commenced this suit in the Pulaski Circuit Court; and such appellants said that when Enoch Rinehart had been served as a party defendant, in the suit pending in the Dearborn Circuit Court, and had appeared and answered therein, he was bound

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to set up, in such suit, any lien which he had on any lands mentioned in the petition in such cause, and, upon the establishment of his lien, to demand judgment therefor and for the foreclosure thereof, in the Dearborn Circuit Court, and that he could not afterwards commence a suit in any other court for the adjudication or settlement of such lien. Wherefore, etc.

Appellee's demurrer to this paragraph of answer was overruled below, and this ruling is assigned here as a cross error. The sufficiency or insufficiency of the facts stated in the paragraph to constitute a defence to his action, however, is a question which appellee's counsel has failed to discuss in his able and elaborate brief of this cause. Whether the paragraph is to be regarded as a plea of the pendency of a prior suit in abatement of appellee's present action, or as an answer of former adjudication in bar of such action, it seems to us that the facts stated therein were sufficient to withstand appellee's demurrer thereto. As a plea in abatement the paragraph was objectionable, because it was not verified, but that objection did not render the plea bad on demurrer, and could only be reached by a motion to reject the paragraph or strike it from the files for the want of proper verification. *Toledo Agricultural Works v. Work*, 70 Ind. 253.

Issue was joined upon the foregoing paragraph of answer by appellee's reply, in general denial thereof. In support of their defence as stated in such paragraph, upon the hearing of the cause, the appellants offered in evidence a certified transcript of the proceedings had, and papers filed, in the Dearborn Circuit Court, upon the petition of Benjamin F. Vail, administrator, etc., of Sarah A. Vail, deceased, against John B. Vail, Enoch Rinehart and others, for the sale of the real estate of such decedent, including the lands in Pulaski county described in appellee's complaint herein. Appellee objected to the admission of such transcript in evidence, for the following reasons, namely: "Because it is irrelevant, immaterial, improper and unlawful, and because it does not re-

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late to the issues in the cause, and there is no judgment against the plaintiff in any wise; because that court had no jurisdiction to pronounce judgment in the record, and because the certificate of the clerk is wholly insufficient for the record as the law requires; because the papers in the case of *Vail et al.* do not appear to have been set out in the record, and because the certificate is not in the proper form of law and is wholly insufficient." These objections were sustained by the trial court, the offered evidence was excluded, and appellants excepted.

The first objection to the admission of the transcript in evidence, urged in argument by appellee's counsel, is the alleged insufficiency of the clerk's certificate appended to such transcript. Omitting merely formal matters, the clerk of the Dearborn Circuit Court certified, over his signature and the seal of such court, "that the above and foregoing is a full, true and complete copy and transcript of proceedings had and papers filed in said matter, as fully as the same appears of record and from the files of said court, in my office remaining." The "said matter," mentioned in such certificate, is stated in the caption of the transcript to be the matter of the petition of Benjamin F. Vail, administrator, etc., against John B. Vail, Enoch Rinehart and other named persons, to sell real estate. We think this certificate was sufficient, both in form and substance, to render all matters set forth in such transcript competent evidence for whatever it might be worth or tend to prove. Section 462, R. S. 1881; *Gale v. Parks*, 58 Ind. 117; *Adams v. Lee*, 82 Ind. 587; *Anderson v. Ackerman*, 88 Ind. 481. In the case last cited the court said: "The certified copy was competent evidence of all it contained, and nothing more. It might be true that if the other proceedings of the court and the pleadings in the cause were not supplied and given in evidence, the mere copy of the judgment and decree would not be sufficient evidence, but it would be none the less competent as evidence for whatever it might be worth."

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We think, also, that the certified transcript offered in evidence in this cause was both relevant and material to the issue joined by appellee upon the paragraph of answer, the substance of which we have heretofore given in this opinion. Considering such paragraph of answer, as we well may consider it, as a plea of the pendency of a prior suit, wherein appellee might and should have set up his alleged lien for adjudication and settlement, in abatement of his present suit, we are of opinion that the certified transcript, offered in evidence and excluded, was relevant and material to the issue joined on such plea in abatement. The jurisdiction of the Dearborn Circuit Court of the subject-matter of the administrator's petition for the sale of his decedent's lands in Pulaski county, under the statutory provisions now and at the time in force, can neither be questioned nor doubted. In section 2336, R. S. 1881, in force since September 19th, 1881, it is provided as follows: "Whenever an executor or administrator shall discover that the personal estate of a decedent is insufficient to satisfy the liabilities thereof, he shall, without delay, file his petition in the Circuit Court issuing his letters, for the sale of the real estate of the deceased, to make assets for the payment of such liabilities."

Under this section of the statute, it is clear that the circuit court, which issues the letters testamentary or letters of administration upon the estate of a decedent, has exclusive original jurisdiction of a petition for the sale of his decedent's real estate, in whatever county the same may be situate, to make assets for the payment of the liabilities of such decedent's estate. In the case before us, the decedent, Sarah A. Vail, resided in Dearborn county at the time of her death, and letters of administration, with the will annexed, were duly issued upon such decedent's estate by the Dearborn Circuit Court to the appellant, Benjamin F. Vail. On the 4th day of December, 1882, the appellant Vail, as such administrator, filed his petition in the Dearborn Circuit Court for the sale of his decedent's real estate, including therein the

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lands in Pulaski county described in appellee's complaint herein. Under the provisions of section 2338, R. S. 1881, in force at the time such petition was so filed, the appellee, Enoch Rinehart, as the holder of a lien on the lands in Pulaski county owned by the decedent, Sarah A. Vail, at the time of her death, was a proper and necessary party defendant to such petition, and he was made a defendant therein and thereto in order that the character and amount of his lien might be ascertained and adjudicated, and its payment provided for. It is shown by the transcript from the Dearborn Circuit Court, which was offered in evidence, that, upon the filing of such petition, a summons was duly issued thereon out of such court, directed to the sheriff of Carroll county, and commanding him to summon Enoch Rinehart to be and appear in the Dearborn Circuit Court on the first day of its February term, 1883, to answer the complaint of Benjamin F. Vail, administrator with the will annexed of Sarah A. Vail, deceased; and that such summons was duly returned by such sheriff, served on Enoch Rinehart, on December 12th, 1882, by reading the same to him in his presence and hearing.

It is further shown by such transcript that at the April term, 1883, of the Dearborn Circuit Court, to wit, on May 31st, 1883, appellee Enoch Rinehart appeared by his counsel and filed his demurrer to the administrator's petition for the sale of his decedent's real estate, which demurrer was overruled by such court; and that afterwards, at the same term of such court, to wit, on June 1st, 1883, appellee Enoch Rinehart filed his answer in abatement in two paragraphs, to which the administrator's demurrer was sustained by the court, and appellee Rinehart was ruled to answer over, and the cause was continued until the next term of such court. Before the next term of such court, which began on the first Monday of September, 1883, the appellee Rinehart, as we have seen, on the 29th day of June, 1883, commenced this suit in the court below to foreclose his lien on the decedent's lands in Pulaski county.

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It is further shown by such transcript that at the September term, 1883, of the Dearborn Circuit Court, appellee Rinehart filed an answer in general denial merely of the administrator's petition, and wholly failed, by counter-claim or cross complaint, to assert any claim to the decedent's lands in Pulaski county, or his alleged lien thereon which he is seeking to enforce in this suit. At the same term of the Dearborn Circuit Court, the transcript further shows that the matters arising under the administrator's petition were heard by such court, and a finding was made in favor of such administrator; and, over Rinehart's motion for a new trial, the court ordered the sale of the decedent's lands in Pulaski county, without providing in any way for either the protection or payment of Rinehart's alleged lien thereon.

We are of opinion that, upon the trial of this cause, the court clearly erred in sustaining the appellee's objections to the admission of the certified transcript from the Dearborn Circuit Court in evidence, and in the exclusion of such offered evidence. This transcript showed upon its face that the Dearborn Circuit Court had jurisdiction, not alone of the subject-matter of the present controversy, but also of the persons of the parties to this suit, or of those under whom such parties claim. The transcript conclusively shows, we think, the pendency of a prior suit, in a court of competent jurisdiction, wherein the appellee Rinehart not only could or might have enforced his alleged lien on the decedent's lands in Pulaski county, but was absolutely required by the provisions of the statute, as we construe them, to set up and assert his alleged lien upon the decedent's real estate, and have the same ascertained and adjudicated by the court prior to or at the time of making the order for the administrator's sale of such real estate. It clearly appeared from such transcript that this action ought not to have been brought during the pendency of the prior suit in the Dearborn Circuit Court, and that the appellee could have, and therefore ought to have, asserted his alleged lien and sought its enforcement in the prior suit.

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Dawson v. Vaughan, 42 Ind. 395; *Moore v. Kessler*, 59 Ind. 152; *Merritt v. Richey*, 100 Ind. 416.

The transcript offered in evidence would have shown, also, that the alleged lien which the appellee was seeking in this suit to enforce against the decedent's lands in Pulaski county, not only might have been, but, under the statute, was required to be litigated, ascertained and determined in the prior suit in the Dearborn Circuit Court. The judgment of that court, in such prior suit, was against the appellee, Enoch Rinehart, as we have seen, and it must now be regarded as final and conclusive, as his appeal therefrom to this court was recently dismissed, in *Rinehart v. Vail*, 103 Ind. 159. Under repeated decisions of this court, from its earliest organization down, the adjudication of the Dearborn Circuit Court against the appellee, in such prior suit, is a final determination against him, not only as to what was actually decided therein, but also as to every other matter which the parties might have litigated in the case, and especially as to the alleged lien which the appellee asserts and seeks to enforce in the case in hand, against the decedent's lands in Pulaski county. *Fischli v. Fischli*, 1 Blackf. 360; *Richardson v. Jones*, 58 Ind. 240; *Elwood v. Beymer*, 100 Ind. 504.

For the error of the court in the exclusion of such certified transcript when offered in evidence, appellants' motion for a new trial ought to have been sustained.

Other rulings of the court, in the exclusion of offered evidence, are complained of here as erroneous, but we need not extend this opinion in considering such rulings, as the views already expressed will not only require the reversal of the judgment below, but will probably put an end to appellee's supposed cause of action.

The judgment is reversed with costs, and the cause is remanded for a new trial, and for further proceedings in accordance with this opinion.

Filed Jan. 19, 1886.

Wright, Administrator, v. Jones et al.

No. 10,728.

WRIGHT, ADMINISTRATOR, v. JONES ET AL.

WILL.—Construction.—Life-Estate.—Devise of Fee to Trustee.—Where all the fee of a wife's estate is devised by her to a trustee with the power of management and disposition, and a life-estate in part of it is carved out for her husband, with the remainder in fee vested in the trustee, the husband takes no greater estate under the will than that carved out for him. Such a devise to the husband shows an intention on the part of the testatrix to make the testamentary provision take the place of the provision made by law.

SAME.—Agreement between Husband and Wife.—Election by Husband.—Relinquishment.—Family Settlement.—Where a husband, to secure a life-estate in the homestead owned by his wife, verbally promises to relinquish his claim to all other interest in her property, and she, in consideration of that promise, undertakes to vest such life-estate in him, the agreement is valid and may be carried into effect by will, and a family settlement after her death.

SAME.—Contract.—Equitable Consideration.—Debtor and Creditor.—In such case, an equitable consideration is sufficient to uphold the contract of the husband, and he may perform it, notwithstanding the objections of his creditors.

SAME.—Parol Partition.—A parol partition of lands, where possession is taken or retained under the agreement of partition, is valid, and the principle that governs such partitions applies to family settlements.

JUDGMENT.—Interest Affected by Lien.—The interest which the lien of a judgment affects is merely the actual interest the debtor has in property.

STATUTE OF FRAUDS.—Defence Personal.—The defence of the statute of frauds is a personal one, and a creditor can not make it for a debtor who insists upon performing his oral agreement.

From the Marion Superior Court.

W. Wallace, L. Wallace and O. T. Boaz, for appellant.

G. Carter, J. N. Binford, A. C. Harris and W. H. Calkins, for appellees.

ELLIOTT, J.—The theory of the appellant's complaint is that the real property in controversy is subject to seizure upon judgments rendered against the appellee Jesse Jones, and that his title to the property, derived through his deceased wife, Louisa J. Jones, is in fee. The fifth paragraph of the answer of the appellees avers that "In the year 1840

105	17
127	356
106	17
131	228
132	26
132	392

105	17
137	620
139	226

105	17
141	184

105	17
149	159
149	181
152	262

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Jesse Jones married Louisa J. Norwood; that at the time of said marriage neither of them had any property or estate; that two children only were born of said marriage, namely, the said Maria, now intermarried with said Foltz, and the said Mary, now intermarried with the said Hawkins; that after said marriage Jesse Jones acquired property from, and by means of, his own industry up to the date of the making of the will, hereinafter set forth. They also show that during the time intervening between the marriage of said Louisa and the making of the will hereinafter mentioned, the father of said Louisa, Mr. George Norwood, from time to time, gave to her, out of his own estate, money and property, which she kept separate and apart from the estate of her said husband, and controlled and received and used the proceeds and income thereof as her own at all times during her life; that heretofore, to wit, on the 23d day of April, A. D. 1874, the said Louisa owned the property described in the complaint, and she, with her husband, resided in certain property situate on Illinois street in the city of Indianapolis, which was known as their home, and which, with her other property, had been given to her by her father; that on said day, she being in feeble health, desired to make a will so as to secure her husband a home during the remainder of his life in said homestead, and to insure to their children during their lives all the rest and residue and remainder of her estate of which she might die seized. At that time said Jesse Jones, her husband, owned valuable real estate in said city of the value of \$50,000, and was not in debt to any persons whatsoever. And the said Jesse greatly desired, in case his wife should first die, to spend the remainder of his life in said family homestead, in which they had theretofore resided for a great many years, and wherein said children had been born and married; that to carry out their mutual purposes and desires, it was then and there mutually agreed, in consideration of their mutual promises, that the said wife, Louisa, should make a will giving to him the use and occupancy of said home during his

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life, in consideration of which he would and did, then and there, agree that she should devise all the rest and residue of her estate to her said children and their descendants; and thereupon, in fulfilment of said mutual agreement and understanding, the said Jesse procured an attorney at his own expense, to wit, fifty dollars, to write a will expressive of their contract, agreement and mutual desire, which will was, on said day, drafted and submitted to them jointly, and accepted and approved by them jointly and severally, as being in fulfilment of said agreement and the true expression of their desires, which will was then and there executed by the said Louisa, and with the full consent of said Jesse, and in pursuance of their agreement aforesaid."

These allegations are followed by a copy of the will of Louisa J. Jones, but we do not deem it necessary to set it forth in full. It is sufficient to say that it makes a bequest to the church of which she was a member, devises the fee of all of her real estate to Howard M. Foltz, in trust for her children, and makes the following provisions respecting her husband:

"Article 3. I give and devise unto my dearly beloved husband, Jesse Jones, my present house, being the premises and house wherein we now reside, and known as number 488 North Illinois street, in the city of Indianapolis, Marion county, Indiana, and being parts of lots seven and eight in Blake's subdivision of out-lot one hundred and seventy in said city, to have and to hold during the term of his natural life, and at his death to descend to my executor, as hereinafter provided, to be held by him as herein directed.

"Article 4. I give and devise and bequeath unto my executor, Howard M. Foltz, and to his successor or successors in and to said trust, all the rest and residue of my real and personal estate, to have and to hold in trust for my two daughters, Mrs. Mary V. Foltz and Maria A. Hawkins, and their children and descendants, in the manner and for the uses following, that is to say:

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"First. My executor shall have and take possession, charge and control of all real estate held by me at the time of my death, and of said house and lot No. 488 North Illinois street at the death of my husband, if he shall survive me; and he shall use and rent the same in such way and manner as he may deem best and most advantageous to my estate, and out of the income thus arising from year to year, he shall pay all taxes, assessments and repairs on or against any or all of said real estate, and the net income thus arising therefrom shall be held by him and used and applied in the same way and manner as the income of my personal estate.

"Second. If, at any time during the life of my said husband, he and my said daughters shall deem it best that said real estate, or any part thereof, should be sold, and if, after the death of my said husband, my said daughters, or the survivor of them, shall so wish, then, on such wish being made known in writing to my executor, the whole or such parts may be sold by said executor, from time to time, under the order and supervision of the proper court having jurisdiction over such executor, as may be deemed best, and the proceeds realized from any and all sales shall be by said executor added to and held in trust for the uses and applied in the same manner as my personal estate."

The answer further alleges that Louisa J. Jones died on the 16th day of February, 1879; that her will was duly admitted to probate; that immediately after the will was probated, the executor surrendered to Jesse Jones the property devised to him; that the latter elected to receive the property in lieu of his interest and right in the estate of his deceased wife, and that it was so delivered to him by the children and trustee of the testatrix.

The first question in natural order is as to the proper construction of the will. If it does not assume to divest Jesse Jones of all interest in the estate of his wife, except that especially devised to him, then, without further inquiry, the principal and decisive point involved in this controversy must

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be resolved in favor of the appellant. Our conclusion is that it does assume to cut him off from all other interest except that specifically devised to him. We put our conclusion upon this general principle: Where a will assumes to dispose of the entire estate of the testator, does dispose of it in terms, does devise the entire estate in trust for beneficiaries expressly named, carves out for a designated devisee a life-estate in a particular piece of property, and directs that the remainder shall, after the expiration of the life-estate, fall into the trust for the beneficiaries designated, it devises to the person for whom the life-estate is carved out that particular estate, and nothing more. This principle is founded on the fundamental one that undergirds all the doctrine of the construction of wills, and this fundamental principle is, that the intention of the testator rules upon all questions of construction. The principle that courts must ascertain and execute the intention of the testator is an elementary one, and needs no more than its statement to command approval. To deny the principle which we first stated involves a denial of this cardinal principle which lies at the foundation of the chief rule for the construction of wills; since it is evident that if the fee in all the property of the testator is disposed of by a devise to a trustee, nothing remains in the devisee to whom a life-estate is devised except that particular estate, for the remainder in fee goes with the other property into the trust. It is inconceivable that a testator should, in clear words, devise all his estate in fee to a trustee, and yet vest in a devisee, to whom is given a life-estate, a fee in part of the same property devised in trust for the beneficiaries named. No reasoning can be valid which assumes that all of the fee of all of the property of a testator can be devised to a trustee, and yet a fee in one-third of the property vest in a devisee to whom a life-estate is devised in clear and unambiguous terms. To restate our original proposition in a somewhat different form: Where all of the fee of all of a testator's estate is devised to a trustee, and a life-estate in part of it is carved out for a designated

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devisee, with the remainder in fee vested in the trustee, the devisee of the life-estate takes no greater estate under the will than that carved out for him. The will under examination would be thrown into irremediable confusion, the intention of the testatrix thwarted, and an irreconcilable inconsistency be produced between its provisions, if the theory of the appellant, that it devises a life-estate to the husband and also leaves in him one-third of the land in virtue of his right as surviving husband, should be adopted; on the other hand, the opposite view carries into effect the intention of the testatrix, prevents all conflict between the different parts of the instrument, and makes its provisions clear and consistent from the beginning to the end. The one result it is the duty of the courts to avert; the other it is their duty to bring about, if it can be done without doing violence to the language of the instrument. Much stronger the reason for bringing about this latter result, where the language is well chosen and unambiguous and the intention clearly and adequately expressed.

We find no decisions directly in point, but we do find cases closely analogous; so much so, indeed, as to declare the principle which rules the case. The cases to which we refer are those in which it is held that where the provisions of the will are clearly inconsistent with the right to dower, the widow will be put to an election. The common law authorities generally agree in holding that, as Redfield expresses it, "It must be reasonably clear that the provisions of the will were intended in lieu of dower." 2 Redf. Wills, 353. Some of the authorities state the rule in stronger terms. 1 Pomeroy Eq. Juris. 541; *Kelly v. Stinson*, 8 Blackf. 387; *Young v. Pickens*, 49 Ind. 23; *Holdich v. Holdich*, 2 Y. & C. Ch. 18; *Strahan v. Sutton*, 3 Vesey, 249; *Lasher v. Lasher*, 13 Barb. 106; *Carroll v. Carroll*, 20 Texas, 731; *Fuller v. Yates*, 8 Paige, 325; *Brown v. Caldwell*, 1 Speers Eq. 322.

Much as the law favors the right of dower, and strong as are the rulings in favor of it, yet it is nevertheless held that where the will on its face clearly shows that the intention

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was that the provisions of the will should be in lieu of dower that intention will prevail. The question received consideration in *Stewart v. Stewart*, 31 N. J. Eq. 398 (1 Am. Probate Cases, 168), and it was said: "A wife will be put to her election between a testamentary disposition in her favor and her dower, when it clearly appears from the will that the testamentary provision was intended as a substitute for the legal one; and the intention will be implied if the claim of dower would be clearly inconsistent with the will." In a similar case it was said by the Court of Appeals of New York, in speaking of the rule that dower is not barred unless the intention to bar it is clear, that "The intention need not be declared in express words. It may be implied, if the claim of dower would be plainly inconsistent with the will." *Savage v. Burnham*, 17 N. Y. 561, 577.

These authorities, to which many more might be added, express the general opinion of the courts and text-writers, and it only remains, in the discussion of this branch of the case, to ascertain whether there are authorities declaring that a will, framed as the present is, can be said to clearly evidence an intention to make the testamentary provision take the place of the provision made by law. There is in this will one controlling provision that evidences the intention to make the testamentary provision a substitute for the legal one, and that is the provision that the whole estate, after the termination of the life-estate, shall vest in fee in a trustee clothed with the power of management and disposition. The rule is, that where there is such a devise to trustees, the testamentary provision supplants that made by law, in so far at least as to put the party claiming in virtue of marital rights to an election. It is said by an English court, that "The will also gives to the trustees the management of the estate, and directs them to make such repairs as they may deem necessary: this provision is also inconsistent with the existence of a right to dower in the wife." *Parker v. Sowerby*, 4 DeG. M. & G. 321. To the same effect are the decisions in *Butcher v. Kemp*, 5 Mad. 45,

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Roadley v. Dixon, 3 Russ. 192, *Miall v. Brain*, 4 Mad. 68, *Goodfellow v. Goodfellow*, 18 Beav. 356.

But it is not necessary to put the construction of the will upon this ground alone, important as is the influence which it exerts, for the whole scope of the language employed clearly and forcibly indicates an intention that all of the real estate of the testatrix, except the life-estate carved out for her husband, shall go to the trustee for the benefit of her children, and this is irreconcilably opposed to the theory that the husband has a life-estate in the property specifically devised to him, and, in addition, an estate in fee in one-third of all the real estate of which his wife died seized.

It is argued with signal ability in the able brief of appellant's counsel, that, conceding that the will does assume to divest the husband of his interest as the heir of his wife, still the appellant must succeed, because a husband can not be put to an election. We do not find it necessary to decide this question, for we think the sufficiency of the fifth paragraph of the answer is maintainable without deciding it.

Our opinion is that the answer pleads facts showing a valid family settlement, which it is the duty of the courts to uphold. We suppose it to be quite clear that if Jesse Jones had agreed with his wife that he would join her in conveying the fee of her real estate to their children, and had executed a deed at the time the will was made, and he was then free from debt, the deed would have been valid. We can conceive of no reason why a husband might not join with his wife in conveying to their children her land, reserving to himself such an interest as they might agree upon. If the contracting parties, at a time when there were no impediments to the consummation of the contract, should agree in writing upon the disposition that should be made of the property of the wife, we can perceive no legal reason, nor any equitable principle, that would prohibit the execution of such a contract. If the husband prefers a life-estate in a particular piece of property, and to secure the desired estate promises to ac-

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cept such a life-estate and to relinquish his claim as to all other interest in his wife's property, and she, in consideration of that promise, undertakes to vest that life-estate in him, the agreement is valid, because it possesses all the essential features of a contract. If the contract were carried into effect by the execution of a deed, it would, as it seems to us, be impossible to impeach it. No ground upon which it could be impeached occurs to us, and none has been suggested. The difference between the case we have put by way of illustration and the real case consists simply in the method of vesting the life-estate in the husband. In the supposed case the method is assumed to be by deed, while in the real case it is by will. We can not believe that the method of vesting the property, whether by deed or by will, can change the legal aspect of the case, provided there is, as here, an execution of the contract by the husband by a family settlement and a delivery and an acceptance of the respective estates created by the wife's will. Once it is granted that such a contract is valid, then it must follow that the method of vesting the estate is not of controlling importance. Equity regards the substance of a transaction, and not the form. Where the substantial merits of a transaction bestow rights upon the parties, form is not of much moment. But there is no legal objection to the form here adopted. A contract to vest land in another by devise is valid. *Bell v. Hewitt*, 24 Ind. 280; *Caviness v. Rushton*, 101 Ind. 500 (51 Am. R. 759); Pollock Prin. of Con. (2 Am. ed.) 310.

Here, then, was a contract founded upon a sufficient consideration, and carried into execution in a legal method. If Jesse Jones had executed a deed conveying all of his interest in his wife's land in consideration of her promise to make a devise to him, it would certainly have been valid, and if this be true, must it not also be true that he may, after his wife's death, make good his promise by performing his oral agreement? The contract exists; all that is lacking is the written evidence. The agreement is as complete between the parties

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as it would be had it been reduced to writing, and there is no reason why the party who has received what he contracted for may not decline to avail himself of the statute of frauds to defeat the contract. No man is bound to make the defence of the statute of frauds; he may, if he elects, perform his part of the oral contract, and this is what Jesse Jones has elected to do.

It perhaps is true that at the time Mr. Jones consummated the acceptance of the life-estate devised to him by the settlement made with his children and their trustee, the consideration then moving to him was an equitable and not a legal one, but this does not change the legal aspect of the case, for it is well settled that an equitable consideration will support a contract. *Wills v. Ross*, 77 Ind. 1 (40 Am. R. 279); *Elston v. Castor*, 101 Ind. 426, *vide* p. 432 (51 Am. R. 754). There are many authorities collected in an article entitled Equitable Consideration, 15 Cent. L. J. 386, which very fully discuss the question and strongly support our conclusion.

Where there is an equitable consideration, a debtor may, notwithstanding the objections of his creditors, perform his contract. It is not for creditors to prevent a debtor from doing what, in good conscience, it is his duty to do. *Hays v. Reger*, 102 Ind. 524; *Brown v. Rawlings*, 72 Ind. 505; *Goff v. Rogers*, 71 Ind. 459; *Wills v. Ross*, *supra*, see p. 8; *Jarboe v. Severin*, 85 Ind. 496; *Copeland v. Copeland*, 89 Ind. 29, see p. 35; *Sedgwick v. Tucker*, 90 Ind. 271, see p. 281; *Livermore v. Northrup*, 44 N. Y. 107; *Hyde v. Chapman*, 33 Wis. 391; Bump Fraud. Con. 220.

The fact that the contract of Jesse Jones was not in writing does not destroy the rights of his children. One reason for this conclusion is supplied by the authorities we have already cited, and another reason is, that the defence of the statute of frauds is a personal one, and a creditor can not make it for a debtor who insists upon performing his oral agreement. *Wolke v. Fleming*, 103 Ind. 105, see p. 111;

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Savage v. Lee, 101 Ind. 514; *Cool v. Peters, etc., Co.*, 87 Ind. 531; *Dixon v. Duke*, 85 Ind. 434; *Morrison v. Collins*, 79 Ind. 417.

A parol partition of lands, where possession is taken or retained under the agreement of partition, is valid. *Savage v. Lee, supra*; *Hauk v. McComas*, 98 Ind. 460; *Bumgardner v. Edwards*, 85 Ind. 117; *Moore v. Kerr*, 46 Ind. 468. The agreement made between Jesse Jones, his children and their trustee was, in effect, a parol partition, for no new titles were created, and nothing more than a division of the interests of the devisees of Mrs. Jones was made, and the estates of the devisees respectively set apart to them. But, if the transaction could not be regarded as a parol partition, still the conclusion as to its validity must be the same, for the principle that governs parol partitions applies to family settlements. Pomeroy Specific Perf., section 121; Fry Specific Perf. (3d Am. ed.), section 583.

The settlement made after the death of Mrs. Jones was a family settlement, and such settlements are regarded with favor by the courts. The reasons for this rule have often been stated, and it is needless for us to repeat them. *Shuee v. Shuee*, 100 Ind. 477; Story Eq. Jur. (12th ed.), section 132; 2 Leading Cases in Eq. (4th Am. ed.) 1683; *Leach v. Fobes*, 11 Gray, 506.

The case under examination is an unusually strong one, for here the settlement carried into effect a contract founded upon an equitable consideration, made with the testatrix prior to her death, and gave full effect to the provisions of the will. The testatrix intended her husband to have a life-estate in the particular property devised to him. She gave him possession, he agreed with her to relinquish all interest in her other property, and the settlement made after her death carries into execution the oral contract, secures to the children the estate their mother desired them to have, and gives to the husband that which he agreed to accept. The

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highest considerations of equity and justice demand that such a settlement should not be disturbed.

Judgment creditors are not *bona fide* purchasers; their rights are essentially different; they have no interest or title in their debtor's land; all they have is a mere lien. The lien is only on the actual interest of the debtor in the land and is subject to all prior equities. There has, perhaps, been some wavering in our line of decisions upon the question as to the rights of judgment creditors, but the rule which rests on principle, and is sustained by the decided weight of authority, is thus stated in one of the latest decisions upon this question: "The interest which the lien of a judgment affects is the actual interest which the debtor has in property." *Hays v. Reger*, *supra*. In a still later case this principle is yet more emphatically declared. *Foltz v. Wert*, 103 Ind. 404.

This doctrine is also fully sustained by the following cases: *Boyd v. Anderson*, 102 Ind. 217; *Heck v. Fink*, 85 Ind. 6; *Sharpe v. Davis*, 76 Ind. 17; *Jones v. Rhoads*, 74 Ind. 510, see p. 513; *Troost v. Davis*, 31 Ind. 34, p. 37; *Glidewell v. Spaugh*, 26 Ind. 319; *Way v. Lyon*, 3 Blackf. 76.

The actual interest which Jesse Jones had in the real estate in controversy was that devised to him by his wife pursuant to the agreement made long prior to her death, and that interest is all that the judgments bind. That interest he contracted for, and, as we have shown, all that was wanting to make his contract complete and perfect at the outset, even under the statute of frauds, was the written evidence, and the place of this evidence, even had it been necessary, was supplied by the family settlement and the acts done under it. It was the evidence, and not the contract, that was originally lacking. Mr. Jones had a right, as against mere judgment creditors, to waive all questions as to the form of the evidence; this he has done, and there is no reason, in equity or justice, why his waiver should not be made effectual and he permitted to perform his oral contract.

The case before us is essentially different from one where

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the husband asserts his rights under the law, repudiates the verbal contract, and demands a strict recognition of his legal rights, for, here, creditors with but a bare statutory lien, reaching no further than the actual interest of the husband, are insisting that the husband shall repudiate his oral contract with his wife, disregard her will and his promise, put aside his settlement with his children, and interpose the defence of the statute of frauds.

It is undoubtedly the law that a husband has no estate in the lands of his wife until her death that a judgment lien will affect, and as at her death Mr. Jones had, by the terms of the will, his contract, and his settlement with his children, by which he desires to abide, nothing more than a life-estate in the property specifically devised to him, that is the only interest upon which the judgment liens fasten.

The judgment of the general term was right, and is affirmed.

Filed Jan. 19, 1886.

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137	58

No. 11,893.

HAWKINS v. JOHNSON ET AL.

NEGLIGENCE.—Master and Servant.—Injury of Teamster by Factory Machinery.—Act Performed by Direction of Foreman.—Knowledge of Danger.—One who, while employed to haul stave-bolts to a factory and to unload them at a certain place, to reach which it is necessary to pass through a narrow way under a revolving shaft, which, without his knowledge, had been broken and repaired with projecting bolts after his last previous load had been delivered, and the wagon way so raised that he could not sit on the load and drive under the shaft as he formerly had done without danger, is directed by his employer's foreman to drive under the shaft, then in motion, and unload his wagon at the usual place, and, in attempting to do so, and in ignorance of the danger until it is too late to avert it, is caught by the projecting bolts and injured, the employer is liable, unless, by the exercise of reasonable care, the employee could have discovered and avoided the danger.

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SAME.—Contributory Negligence.—Instruction.—Province of Jury.—In such case, the employee being ignorant of any hazard, an instruction that the employer had the right to expect that if there were a hazardous course, and a non-hazardous course, he would adopt the non-hazardous one, and that if he voluntarily chose to take the dangerous course, and was injured, he had contributed to his own injury and could not recover, is an invasion of the province of the jury and erroneous.

SAME.—Direction by Employer to Drive Over Particular Way.—Presumption of Safety.—One who is directed by an employer to drive over a particular way has the right to assume that the way is at least reasonably safe, and, if he had previously driven over it, that it is as safe as on the former occasions.

From the Martin Circuit Court.

T. M. Clarke and *A. T. Rose*, for appellant.

C. S. Dobbins, for appellees.

ZOLLARS, J.—Appellant brought this action to recover damages resulting from a personal injury received at the stave factory of appellees.

The evidence tends to establish the following facts: Appellees, at the time of and prior to the injury of appellant, were the owners of a stave factory, the machinery of which was propelled by steam-power. An iron shaft, about two inches in diameter, extended horizontally from the factory building and connected with, and furnished the means of operating, a pump which supplied water for the boiler. The shaft was supported by two posts, which were about thirteen feet apart. Between these posts, and under the shaft, there was a wagon way, used for bringing in staves to be worked in the factory. Frequently, staves were thrown and piled between the posts, so that the way was narrowed to eight, nine and ten feet. The shaft was enough above the ground that a person might drive under it, sitting upon a wagon loaded with staves. The shaft was operated by the engine in the factory, and when being used made about two hundred and sixteen revolutions per minute. It was smooth, having no projections upon it that would catch the clothes of a person in close proximity. This was the condition of things

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when appellant was employed by appellees to haul staves from the country and unload them in the yard of the factory. Three weeks prior to the injury appellant had brought in three or four loads of staves, and had driven over the way and under the shaft, and unloaded them at the usual place, and, so far as shown, the only place where such staves were kept. Between this time and the time when appellant was injured, the shaft had been broken near the middle, and by appellees' direction had been repaired. It was repaired by means of a collar covering the break, and about two feet long. This collar was about a half inch thick, or three inches in diameter, and was kept in place by means of bolts passed through it and the shaft. The heads of these bolts protruded beyond the collar about a half inch. The other end of the bolts, with the nuts thereon, protruded about three-quarters of an inch beyond the collar. The way had also been raised, so that a person sitting upon a load of staves could not pass under the shaft. This was known to appellees, having been done by their direction. On the 6th day of January, 1883, appellant went to the factory with a load of staves, and was directed by appellees' foreman to drive under the shaft, which was then in motion, and unload the staves at the usual place. Appellant was ignorant of the facts that the way had been raised, and that the shaft had been broken and repaired. The foreman did not inform him of either fact. At that time, also, staves were piled between the posts, so that the way was narrowed to eight or nine feet. Being thus ignorant, and not noticing any change, appellant obeyed the direction of the foreman, and attempted to drive under the revolving shaft. When his horses came under the shaft he noticed that it was too low to permit him to pass under it. He thereupon dropped his lines and stepped over the shaft. In attempting to take them up again, his clothes were caught by the bolts projecting from the collar on the shaft, he was lashed to it, and his right arm was so broken and torn that amputation was necessary. The increased size of the shaft at the place

where it was repaired, occasioned by the collar, might have been noticed, but the projecting bolts could not have been seen when the shaft was revolving, as it was.

The testimony of appellees' foreman is, that he directed appellant to drive where he had been taking the staves before. There is no evidence that there was any other way to reach that place except the way under the revolving shaft, nor that the foreman indicated any other way aside from that which the appellant and others alike engaged had been accustomed to use. There is no direct evidence as to the powers and duties of the foreman, but it seems to have been conceded that he had authority to act for the principal and give the directions he did.

Upon this evidence, which is within the issues, the court gave twelve instructions, to the giving of the 6th, 7th, 8th, 9th and 10th of which appellant excepted. First, in the order of discussion by counsel, is the ninth, which is as follows:

"9. It is insisted by the plaintiff that he was directed by defendants' foreman to drive with his loaded wagon under the shaft in question. If it is true, as plaintiff insists, that he was required to drive under the shaft, and that in obedience thereto he did so and was injured, still, if you find it was an act of carelessness and negligence on the part of the plaintiff to drive under and step over the revolving shaft when his clothing was caught and he was dragged upon the shaft, then the fact that he was directed to drive under the shaft would not authorize plaintiff to expose himself needlessly and carelessly by stepping over the shaft. In passing a point of danger, the employee must not voluntarily expose himself to dangers and perils which he could avoid by another course of conduct or action, which reasonably might be adopted. When there are two or more courses of conduct or action before such person equally within reach, and one or more of them dangerous and hazardous, and another not dangerous and hazardous, the employer has a right to expect that he will adopt the non-hazardous course; and if

he voluntarily chooses to take the dangerous and hazardous course, and is thereby injured, he has contributed to his own injury and can not recover."

The latter part of this instruction, at least, is erroneous, for the reason that it puts the case to the jury upon a basis not warranted by the evidence, and because therein the court usurps the province of the jury in determining what, in this case, might constitute contributory negligence on the part of appellant. As we have seen, there is no evidence that there was any other way over which appellant might have driven to reach the usual place of unloading the staves. There is a conflict in the evidence as to whether or not the way under the shaft was sufficiently wide, between the staves piled therein, to allow appellant to walk beside the wagon and drive his team. Doubtless, he might have gone with the horses and led them under the shaft. It may be that the court had reference to one or both of these modes of conducting the horses under the shaft, in speaking of a non-hazardous course of conduct. However that may be, it was erroneous, under the evidence, to charge the jury that the employer, the appellees in his case, had the right to expect that appellant would adopt the non-hazardous course, if there was any. He did not know that there was any hazard. He had driven over the way before with safety, and so far as shown by the evidence there was no danger in so doing. It had been rendered dangerous by reason of being raised, and by reason of the projecting bolts. Of these changes he had no knowledge. Being thus ignorant of the dangers that appellees had created, relying upon his former knowledge of the way as a safe way, and obeying the directions of appellees' foreman, they had no right to expect that he would get from his wagon and walk with his horses or beside the wagon, if that were possible, or that he would do otherwise than as he had formerly done. When appellant was directed by the foreman to drive over the way, he had a right to believe that

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it was, at least, as safe as when he drove over it on former occasions. Instead of appellees having the right to expect that he would discover the danger and adopt the less hazardous course, if there was any such, it was clearly their duty, when they, by their foreman, directed him to pass over the way to inform him of the changes and resulting danger. Neither an employer nor any other proprietor has a right to direct or invite an employee or other person, having business at and upon his premises, to drive over a particular way, and expect that such employee or person will take precautions to avoid unknown dangers. Such direction or invitation, in such a case, is an implied statement that the way is a safe way. The person thus directed or invited has the right to assume that the way is, at least, a reasonably safe one. *Nave v. Flask*, 90 Ind. 205 (46 Am. R. 205); *Indiana Car Co. v. Parker*, 100 Ind. 181.

The direction by the foreman in this case might well have thrown appellant off his guard, and occasioned the exercise of a less degree of care than he might have exercised but for such direction. Having directed appellant to drive over the way, and having given him no notice of the danger, appellees ought to be held liable unless appellant by the exercise of reasonable care might have discovered the danger and avoided the injury.

In all of the instructions the court below treated the case as being one of an employee engaged to work with and about machinery. We do not think that it is such a case. Appellant clearly was not employed to work with and operate machinery, nor was he, in a proper sense, employed to work about machinery; he was employed simply to haul staves to the factory. There was not, necessarily, any hazard connected with his employment; surely none as connected with the machinery of the factory. *Buzzell v. Laconia Manfg. Co.*, 48 Maine, 113.

But if the case should be put upon the theory of the court, it would be no less the duty of the employer to inform the

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employee of increased danger, created by him in the change of the machinery, unless the employee has notice, or such changes and increased danger are so apparent that he ought to take notice. *Atlas Engine Works v. Randall*, 100 Ind. 293 (50 Am. R. 798); *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88; *Stringham v. Stewart*, 3 N. E. Rep. 575, 579n; *O'Neil v. St. Louis, etc., R. W. Co.*, 9 Fed. R. 337; *Hobbs v. Stauer*, 62 Wis. 108; S. C., 22 N. W. R. 153; *Indianapolis, etc., R. R. Co. v. Love*, 10 Ind. 554; Whart. Neg., section 206; *Buzzell v. Laconia Manfg. Co.*, *supra*.

Whether or not in this case appellant ought to have taken notice of the changes and resulting danger, and was guilty of contributory negligence because he did not avoid the danger by a different course of conduct, is another question. Following the portion of the instruction above commented upon, the instruction closes as follows: "And if he voluntarily chooses to take the dangerous and hazardous course, and is thereby injured, he has contributed to his own injury, and can not recover."

As applied to the evidence in this case, this instruction is, that if there were a hazardous course, and a non-hazardous course of conduct that appellant might have adopted, and he voluntarily chose to adopt the hazardous one, which was to step over the revolving shaft, he was guilty of contributory negligence, and can not recover. This was a clear usurpation of the province of the jury.

As we have seen, appellant obeyed the direction of the foreman; he had no knowledge, nor was he warned, of the changes and resulting danger. He seems to have made no inspection of the way or revolving shaft before attempting to drive under it. He seems to have relied upon his previous knowledge and the direction of the foreman. He did not know, nor did he notice, that he could not pass under the shaft until his horses had come under it, and then, instead of stopping his horses, if that were possible, or dropping his lines and jumping from the wagon, or jumping from the wagon

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and holding on to the lines, if either were possible, he dropped the lines, that they might pass under the shaft, and stepped over it, and attempted to take them up. Whether he might have stopped the horses, got off the wagon, and drove or led them under the shaft with safety; whether he might have jumped from the wagon and escaped injury, and whether or not one or the other of the above indicated courses of conduct was open to him, and whether one or the other was the most prudent for him to adopt under all the circumstances, and whether or not under all of the circumstances he acted as an ordinarily prudent person, were questions for the jury, under proper instructions from the court. The court could not say that one course or the other was the more prudent, nor that the adoption of the more hazardous was, under all the circumstances, as a matter of law, contributory negligence. *Indiana Car Co. v. Parker, supra*; *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Pittsburgh, etc., R. W. Co. v. Wright*, 80 Ind. 236; *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43 (32 Am. R. 94).

The adoption of the more hazardous course of conduct is not necessarily negligence. That depends upon the knowledge of the actor and the circumstances under which he is called upon to act. He might be ignorant of the less hazardous course, and he might be called upon to act under such circumstances as that he should not be required to exercise the best judgment in choosing between different courses of conduct.

Mr. Wharton says: "A prompt and faithful employee, suddenly called upon by a superior to do a particular act requiring immediate attention, can not be supposed to remember at the moment the defect that would make his doing the act dangerous; and even if he should remember it, he may conclude, from the fact that he is ordered to do the particular act, that the defect, which would have interfered with the execution of such an order, is remedied." Whart. Neg., section

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219, and cases there cited. *Greenleaf v. Illinois Central R. Co.*, 29 Iowa, 14, 47 (4 Am. R. 181).

For the error in giving the ninth instruction the judgment must be reversed. We think it is not necessary to consider separately the other instructions, as what we have said disposes of the material questions made upon them.

The judgment is reversed, with costs, and the cause remanded with instructions to the court below to sustain appellant's motion for a new trial.

Filed Jan. 9, 1886.

No. 12,146.

THE INDIANAPOLIS AND CUMBERLAND GRAVEL ROAD CO. v.
THE STATE, EX REL. FLACK, COMMISSIONER, ETC.

DRAINAGE.—*Act of April 8th, 1881.*—*Construction of.*—*Notice.*—*Easement.*—

The provision of the drainage act of April 8th, 1881, which requires notice of the petition to be posted in three public places, etc., provides a means of giving notice to all persons or corporations owning lands described in the petition, and such notice applies as well to those who own easements in land as to those who own any other interest or estate therein.

SAME.—*Notice.*—*Collateral Attack.*—In an action to foreclose a lien on the defendant's right of way for an assessment of benefits growing out of the establishment of a ditch, it will be presumed, as against a collateral attack, that the defendant's interest in such right of way was properly described in the petition, and that proper notice was given.

SAME.—*Pleading.*—*Defence to Action to Foreclose Lien.*—In an action to foreclose such lien, an answer that the ditch, as it is being constructed, does not conform to the plans and specifications filed, or to the ditch as described in the report of the commissioners or order of the court; that the commissioner does not intend to build such a ditch as that described and ordered, and that he has departed widely from the specifications in various particulars; that he can not and does not intend to finish the ditch; that he has abandoned the construction of about five hundred feet of the work at one end of the ditch as proposed and laid out, and that by reason thereof the water will be poured into another ditch of

105	37
131	406
105	37
138	116
105	37
141	436
105	37
144	262
105	37
152	95
152	97
105	37
162	480

105	37
170	581

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inadequate capacity, and will be backed on and over the defendant's road, to its damage in a much larger sum than the amount of its assessment, is bad on demurrer.

SAME.—Turnpike Company.—Sale of Property.—Where a specific statutory lien is acquired upon the whole, or any part of the easement of a turnpike company in its roadway, such lien may be enforced by a decree of foreclosure and sale.

CORPORATION.—Sale of Property on Judicial Process.—As a general proposition, it is true that the property of a public corporation, essential to its corporate existence and the execution of its corporate duty, can not be sold on execution or otherwise except as provided by statute, but as respects gravel road companies, statutory authority to that end is conferred.

From the Marion Circuit Court.

W. F. Elliott, for appellant.

A. B. Cole, for appellee.

MITCHELL, J.—This is an appeal from a judgment and decree of the Marion Circuit Court. The judgment was for the amount of an assessment of benefits, growing out of the establishment of a ditch. The decree foreclosed a lien on the appellant's right of way and ordered the sale of a specified portion thereof to satisfy the judgment.

The first error assigned brings in question the ruling of the court in overruling the appellant's demurrer to the complaint.

It is argued that the act concerning the drainage of lands makes no provision for giving notice of the petition and proceedings to the owners of easements in lands, and that as the appellant's right of way against which the benefits were assessed was nothing but an easement, the assessment upon which the suit was predicated was unauthorized.

The statute under which the assessment in question was made, provides how lands affected shall be described in the petition. It also provides for the assessment of benefits and injuries to easements held in lands by railway or other corporations. It also provides the manner of giving notice to persons interested, by prescribing that notices shall be posted

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in the several townships in which the lands described in the petition are situate.

We think the provision which requires notice of the petition to be posted in three public places in each township in which the lands described in the petition are situate, provides a means of giving notice to all persons or corporations owning lands thus described, and that such notice applies as well to those who own easements in land as to those who own any other interest or estate therein.

The statute provides a means of giving notice of the proceedings to all whose lands or easements, or other interest in lands, which are subject to assessment, and which are sufficiently described in the petition for the establishment of the ditch. As the appellant's easement or right of way was subject to assessment, we must presume, as against a collateral attack, that its interest in its right of way was properly described in the petition, and as the law provides for notice to all whose lands or interest therein are thus described, we must further presume that proper notice was given. *Young v. Wells*, 97 Ind. 410; *Jones v. Cardwell*, 98 Ind. 331; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486.

An answer filed by the appellant presents, as a defence to the collection of the assessments sued for, that the ditch, as the same is being constructed by the commissioner who has the work in charge, does not conform to the plans and specifications filed, or to the ditch as described in the report of the commissioners, or the order of the court. It is averred, moreover, that the commissioner does not intend to build such a ditch as that described and ordered, and that he has departed widely from the specifications in various particulars; that the commissioner can not and does not intend to finish the ditch; that he has abandoned the construction of about five hundred feet of the work at one end of the ditch as proposed and laid out, and that by reason thereof the water will be poured into another ditch of inadequate capacity, and will

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be backed on and over the defendant's road, to its damage in a much larger sum than the amount of its assessment.

The court sustained a demurrer to this answer, and this ruling is assigned as error.

It is true, as counsel for appellant forcibly contends, that, in a statutory proceeding affecting the property of the citizen, the statute must be substantially pursued, and that any material variance from the course of procedure therein prescribed vitiates the proceedings when properly brought in question. *Merritt v. Village of Portchester*, 71 N. Y. 309 (27 Am. R. 47); *Combs v. Etter*, 49 Ind. 535.

This doctrine is peculiarly applicable to the proceedings prescribed in the location and establishment of the ditch in the first instance.

The irregularities and departures set up in the answer do not pertain to the proceedings. They are not challenged. The omissions and departures, which are relied on as a defence, relate to the conduct and purposes of the commissioner who has the construction of the ditch in charge. As it seems to us the rule stated has no application to the facts relied on as a defence. The drainage commissioner, while he is constructing the work, is under the control and direction of the court, and it is provided in the statute that he must obey such directions, subject to the penalty of being dealt with as for a contempt, or of being removed by the court and subjected to damages on his bond. The remedy, therefore, is to apply to the court, and through its order and intervention secure the due execution of the work. The proceeding establishing the ditch and assessing benefits having been regularly taken, payment of assessments may be enforced, and it will be no answer in such a case to assail either the practicability of accomplishing the work so ordered or the conduct of the commissioner who has its execution in charge. That it was practical must be deemed to have been determined in the proceeding for the establishment of the ditch, and can not be again inquired into. If the commissioner is proceed-

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ing contrary to the method prescribed, or in any other manner neglecting his duty, a direct application to the court will secure the performance of its order. *Anderson v. Baker*, 98 Ind. 587; *Patterson v. Baume*, 43 Iowa, 477. We think the demurrer to the answer was properly sustained.

The next objection urged against the rulings of the court relates to the form of the decree.

The court rendered judgment against the appellant for the amount of the assessments, and gave a decree foreclosing the lien on its right of way. It also ordered the sale of a specified portion of the right of way to satisfy the judgment. The sale was ordered without relief from valuation or appraisement laws. The defendant objected and excepted to the decree and order of sale.

The point made in respect to the decree and order is, that it was not competent for the court to enforce a lien for the assessment, and order a sale of part of appellant's right of way. It is said that the appellant's interest in its right of way is a mere easement, and was not subject to the enforcement of a lien, or to be sold in the manner ordered by the court.

As we have already seen, the statute regulating the subject of draining provides that benefits and injury to easements in lands held by corporations, which are affected by the construction of a ditch, shall be estimated. It also provides that the commissioners shall embrace a description of all lands against which assessments are made in their report, and that the amounts shall become a lien on the lands against which they are assessed.

We think from the whole scope of the act, it was the purpose of the Legislature to provide that all interests in land—no matter to whom it belonged—which might receive benefits from drainage, were subject to assessment for such benefits, and that the benefits so assessed should become a lien on the land or interest against which it was assessed. If in any case the right or interest of any person or corporation in any

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land which is described in the petition is such that it is not subject to assessment of benefits, and consequently not subject to a lien for benefits assessed, this should be made to appear during the progress of the proceeding. If the proceeding is allowed to go to the extent of fixing an assessment on a specified interest or easement in land which is subject to assessment whether the interest or easement so assessed is owned by a natural or artificial person, the lien which follows such assessment can not be defeated by a collateral attack on the proceeding which imposed it.

We have, therefore, this proposition: The statute authorizes assessments of benefits to be made against easements held by corporations in lands, which are properly described in the petition for the establishment of the drain, and in the report of the commissioners to whom the petition is referred. It also provides that such assessments shall constitute a lien on the land against which it is assessed.

An assessment having been made and confirmed against an easement or right of way of a corporation, we must conclude that the easement, against which the assessment was made, was one against which an assessment could properly be made and one upon which a lien attached, as the statute provides it shall, and that all such other steps may be taken as are provided for making the lien effectual.

The assessment sued for was, therefore, to be treated as constituting a lien on the appellant's easement in the land over which it had a right of way, as the same was described in the proceeding establishing the ditch. This lien the statute by its terms authorized the commissioners of drainage to enforce.

This court held in *Baltimore, etc., R. R. Co. v. North, supra*, that lands devoted to a public use by a corporation, under the power of eminent domain, could not be taken for another use without special authority to that end. Accordingly, it was ruled in that case that courts had no jurisdiction to order the location of a ditch longitudinally along the right

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of way of a railroad. That question is, however, not involved here. We assent also to the general proposition, that the right of way of a railroad or turnpike company is not subject to sale on judicial process unless made so by statute. As respects gravel road companies, we think statutory authority to that end is conferred.

Section 3646, R. S. 1881, concerning gravel road companies, provides that, upon execution issued upon any judgment or decree rendered in favor of any person or persons against a gravel road company, the property shall be sold without any valuation or appraisement.

Whatever might be said concerning the right to sell the easement in part or the whole roadway of a turnpike company to satisfy an execution, we have no doubt that where a specific statutory lien is acquired upon the whole or any part of such easement, such lien may be enforced by a decree of foreclosure and sale. Where the statute fastens a specific lien on property, and authorizes the enforcement of such lien, a court must have the power to render a decree which will be effectual for its enforcement. The general proposition is true, and well supported, that the property of a public corporation, essential to its corporate existence and the execution of its corporate duty, can not be sold on execution or otherwise except as provided by statute; but the scope and meaning of the act under which gravel road companies are organized plainly indicates that its property in its road-bed is, to say the least, subject to sale in pursuance of a decree enforcing a statutory lien against it. Sections 3654, 3658, 3665, R. S. 1881.

These sections provide that upon a sale of a gravel road upon any judgment rendered against it, the directors or other officers shall have the right to become purchasers the same as other persons, and that an organization may be formed for the purpose of purchasing and using a part or section of a road already built. *Rowe v. Major*, 92 Ind. 206.

It thus results that the decree enforcing the lien and order-

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ing the sale in the manner prescribed in the decree was not erroneous.

Judgment affirmed, with costs.

ELLIOTT, J., did not participate in the decision of this case.

Filed Jan. 21, 1886.

105	44
198	104
105	44
155	69

No. 12,074.

CARVER v. LEWIS, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Administrator.—Failure to Inventory and Account for Assets.—Final Settlement.—Conclusiveness of.*—The assignee of the children of a decedent can not maintain an action against the latter's administrator, who has made a final settlement and been discharged, and while such settlement remains in force, on the ground that, as administrator, he failed to turn over to himself, as guardian of such children, their portion of assets of the estate which he failed, as administrator, to inventory and account for, because such final settlement of the decedent's estate was an adjudication that he had properly accounted for all of such assets.

From the Putnam Circuit Court.

H. H. Mathias and *J. B. Black*, for appellant.

D. E. Williamson and *A. Daggy*, for appellee.

ZOLLARS, J.—Appellant instituted this action to have a claim allowed against, and collected from, the estate of Jacob Durham, deceased, of which estate appellee is administrator. He filed an amended complaint in the circuit court, to which a demurrer was sustained. He seeks by this appeal to have that ruling reversed.

The complaint, in the main, is the same as the complaint in the case of *Carver v. Lewis*, 104 Ind. 438. We need not, therefore, set it out here. There is this difference; here the appellant is seeking to recover, as the assignee of two of the children of Benjamin A. Durham, deceased. The assignment

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was made to him by said children in 1879, after they had become of age. By this assignment, he claims to have become the owner of the one-third of the amount collected upon the Williams notes by Jacob Durham and his administrator. There are these further and different averments, that during his life, and while he was administrator of the estate of Benjamin A. Durham, Jacob Durham was the guardian of the minor children of said Benjamin A., and that he did not turn over to himself, as such guardian, nor did he as such guardian, receive any portion of said notes, or the money collected upon them. He died while acting as such guardian. Whether or not a final report was made, or a final settlement was had, of his administration as such guardian, is not shown by any averments in the complaint. We are unable to see how these different averments can make any difference in the results in the two cases. The children were not entitled to any portion of the notes, nor the money collected upon them, except as they should receive them or it, as a part of their father's estate, and through the administration of that estate, because, as the complaint shows, there was an acting administrator of the estate, a widow surviving, and debts against the estate. In such a case, neither the children nor their guardian could prosecute an action against the holder of the notes or money. *Walpole's Adm'r v. Bishop*, 31 Ind. 156; *Bearss v. Montgomery*, 46 Ind. 544; *Ferguson v. Barnes*, 58 Ind. 169.

The approval of the final report of Jacob Durham as the administrator of the estate of Benjamin A., and the final settlement of the estate, was an adjudication as against interested parties, that all of the notes and money belonging to that estate, in the hands of the administrator, or over which he had any control, or for which he was in any way liable, had been turned over to himself as such administrator, and by him properly disposed of and accounted for. If Jacob Durham, in his individual capacity, in fact held notes and money of the estate which he did not turn over and account for as ad-

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ministrator, the wrong was in the administration of that estate, the final settlement thereof, and the discharge of the administrator. So long as that final settlement stands, neither the children, their guardian nor assignee could, or can, recover from Jacob Durham, or the administrator of his estate, on the ground that he held notes and money that he did not, but should have turned into the estate. The children, for cause shown, might have had the final settlement set aside, and the estate re-opened at any time within three years after becoming of age. 2 R. S. 1876, p. 537, section 116; R. S. 1881, section 2403. This they have not done, nor attempted to do. This action is not for that purpose, but to recover notwithstanding such final settlement.

For the reasons here given, and the reasons stated more at length in the case of *Carver v. Lewis, supra*, appellant can not recover in this action. The ruling of the court below was correct.

Judgment affirmed, at costs of appellant.

Filed Oct. 13, 1885, petition for a rehearing overruled Jan. 6, 1886.

 No. 12,241.

BROWN v. RUSSELL & Co.

CONTRACT.—*Merger of Verbal Agreements in Written Contract.*—*Vendor and Purchaser.*—*Warranty of Machinery.*—Where the agent of a vendor verbally warrants machinery as a part of the preliminary negotiations for its sale, and a written contract of sale between the parties is subsequently executed, all previous verbal negotiations and agreements are merged. **SAME.**—*Notice of Breach of Warranty.*—*Continued Possession.*—Where it is provided in such contract that written notice of any breach, within "ten days of first use," of warranty shall be given by the vendee to the vendor, and that continued possession or use of the machine after the expiration of the ten days shall be conclusive evidence that the warranty is fulfilled to the satisfaction of the vendee, the failure of the vendee to give

106	46
128	288
106	46
137	190
106	46
143	614

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the notice or to deliver possession will defeat a defence to the recovery of purchase-money founded on a breach of warranty.

CHATTEL MORTGAGE.—*Foreclosure.*—*Equitable Jurisdiction.*—*Trial by Court.*

—A suit to foreclose a chattel mortgage was of exclusive equitable jurisdiction prior to June 18th, 1852, and under section 409, R. S. 1881, the issues of law and fact in such case must be tried by the court.

From the Sullivan Circuit Court.

J. H. Blake and J. W. Shelton, for appellant.

G. W. Kleiser, J. H. Kleiser, J. T. Hays and H. J. Hays, for appellee.

Howk, J.—The appellee, Russell & Co., a corporation of that name, commenced this suit against appellant Brown, in the Vigo Superior Court. The object of the suit was to foreclose a certain chattel mortgage, executed to appellee by the appellant to secure the payment of certain promissory notes also executed by him to appellee, and to collect the debt evidenced by such notes. After the cause was at issue, on appellee's application, the venue thereof was changed to the Sullivan Circuit Court. There the cause was heard by the court, and, at appellant's request, the court made a special finding of the facts and thereon stated its conclusions of law in favor of appellee. Over appellant's exceptions to its conclusions of law, the court rendered its final decree herein, in accordance therewith, against him and in favor of appellee.

In this court appellant Brown has assigned several errors, but of these only one is properly saved in, or presented by, the record of this cause, namely: Error of the court in its conclusions of law upon the facts specially found.

The facts found by the court were, in substance, as follows:

1. In 1882, during the months of June, July, August and September, one J. F. McCandless was the duly appointed agent of appellee to sell its machinery, including steam engines and separators, in Vigo county, Indiana.

2. One — Myers was agent for appellee in and for the State of Indiana, and had supervision of local agents, and assisted them in the sale of appellee's machinery.

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3. In June, 1882, McCandless and Myers negotiated with appellant for the sale to him of a steam engine and separator, and he agreed to pay therefor the sum of \$1,625, to be paid as follows: \$545 October 1st, 1882, \$545 October 1st, 1883, and \$535 October 1st, 1884.

4. In such negotiations, the agents aforesaid verbally warranted such machinery to be well made and of good material, and, with proper management, capable of doing as good work as similar articles of other manufacturers.

5. Afterwards, on June 5th, 1882, appellant signed a written and printed order to appellee for such machinery to be shipped to McCandless, in which appellant agreed to receive such machinery, subject to the following conditions: "The above articles are warranted to be of good material, well made, and, with proper management, capable of doing as good work as similar articles of other manufacturers." Such written order contained further stipulations, to wit: "If said machinery, or any part thereof, shall fail to fill this warranty within ten days of first use, written notice shall be given Russell & Co., Massillon, Ohio, and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity and friendly assistance given to reach the machine and remedy any defects." It is further provided in said order as follows: "If the defective machinery can not then be made to fill the warranty, it shall be returned to the place where received, and another furnished on the same terms of warranty, or money and notes returned to the amount represented by the defective machinery, and no further claim be made on Russell & Co." Such order contained the further stipulation, to wit: "Continued possession or use of the machine, after the expiration of the time named above, shall be conclusive evidence that the warranty is fulfilled to the satisfaction of the purchasers, who agree to thereafter make no other claim on Russell & Co., under the warranty. All warranties to be invalid and void

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in case the machine is not settled for when delivered, or if the warranty is changed by erasure, addition or waiver."

Such was the substance of the conditions in said order. Preceding the date and at the top of such order, is printed the following: "This order taken subject to the acceptance of Russell & Co. Purchasers will note, that no promises made by any person, whether agent, employee or attorney, will be considered binding unless made in writing and ratified by home or branch office." Appellant Brown signed such order without reading the same, or having it read over to him, but was informed that the warranty of the machinery would be the same as that which had been stated in the verbal negotiations.

6. The order was handed to Myers, the general agent for the State, and was by him forwarded to the branch office of Russell & Co., at Indianapolis, and by it accepted and acted upon.

7. Pursuant to such order, the machine in complaint mentioned was delivered to appellant Brown at the public square in the city of Terre Haute, on the 8th day of July, 1882, and appellant executed to Russell & Co. his four promissory notes, one for \$250, due September 1st, 1882, one for \$325, due October 1st, 1882, one for \$545, due October 1st, 1883, and one for \$535, due October 1st, 1884, all drawing eight per cent. interest, payable annually until paid, without relief, and attorneys' fees, and to secure such notes appellant executed a chattel mortgage on said machinery. Such mortgage was duly recorded, and the consideration for the notes and mortgage was the sale of such machinery to appellant.

8. Such machinery was tested by appellant on the 9th day of July, 1882, and failed to do good work. He verbally notified appellee's agent on the same day, and Myers attempted to make the machinery do good work, but did not succeed.

9. Appellant attempted further to make the machinery do good work, until July 14th, 1882, at which time he notified

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McCandless, and then offered to return the machinery to him in the city of Terre Haute, and was informed by McCandless that he could not receive it, because he had no room for it, and he requested appellant to keep it until he could see further about it.

10. Appellant did retain the machine and attempted to use it, until in September, 1882, since which time it has been in his possession, but has not been used, nor has there been any attempt to use it.

11. Such machinery is not well made nor of good material, nor is it under proper management capable of doing as good work as similar articles of other manufacturers.

12. As a thresher and separator, such machine has no value, but, as property, it has a market value, the amount of which the court is unable to determine from the evidence.

13. Appellant purchased such machinery for a thresher and separator, as appellee knew at the time of the sale.

14. Appellant has not, in point of fact, converted any portion of such machinery to any other use or purpose, and does not retain the same, nor any portion thereof, with any such intention.

15. Such machinery was properly managed in attempting to use it.

16. Such machinery was not well made, in this: The engine was not in line, and was so constructed that it would not generate steam enough to afford proper power. The separator would not take the wheat from the straw, and would choke up and stop when heavily fed, and, when fed otherwise, would break and crack the wheat, and, with proper management, would not thresh more than two hundred and fifty or three hundred bushels of wheat per day, and the expenses exceeded the earnings.

17. Similar articles of other manufacturers, with proper management, would thresh of wheat from one thousand to one thousand two hundred bushels per day.

18. Agents McCandless and Myers were instructed by ap-

pellee to make no verbal warranties, but appellant had in fact no knowledge of such instructions.

19. The verbal warranty was made by McCandless and Myers, and is, in substance, the same as that named in the written and printed order, upon which appellee delivered to appellant the machinery mentioned in the complaint.

20. Appellee received, accepted and retained the notes and mortgage given by appellant and sued on, without any knowledge of the fact that such agents had made a verbal warranty to appellant. At no time did appellee make out and sign a duplicate order, as was its custom, and deliver the same to appellant, neither did its agents do so for it, nor any other writing containing such warranty.

21. Appellee is a corporation, duly organized under the laws of the State of Ohio.

22. The notes sued on, due at commencement of the suit, amount to \$633.10.

23. One hundred dollars is a reasonable attorney's fee for collecting the amount of such notes and foreclosing a chattel mortgage to secure the same.

Upon the foregoing facts, the court stated, as its conclusion of law, that appellee was entitled to judgment for the amount found due on the notes, and to a decree for the foreclosure of the mortgage in suit and for the sale of the mortgaged chattels, etc.

In their brief of this cause, appellant's learned counsel, in speaking of the court's conclusion of law, say: "This, it seems to us, is as clear a case of *non sequitur* as could well be imagined." They then proceed to show, from the court's finding of facts, that appellant purchased of Russell & Co. the machinery which constituted the sole consideration of the notes and mortgage sued upon herein under the warranty, verbal and written, of Russell & Co., that such machinery was "of good material, well made, and, with proper management, capable of doing as good work as similar articles of other manufacturers." They further show from the facts

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found by the court, that the warranty of Russell & Co., of the machinery purchased by appellant, from the date of its delivery to him down to the final hearing of this cause, had been and was broken in every material particular; that such machinery was not of good material, was not well made, and, with proper management, was not capable of doing as good work as similar articles of other manufacturers. Finally, counsel show from the findings of the court, that the machinery was of no value whatever as a "thresher and separator," for which purpose it was sold and warranted by Russell & Co., and with its knowledge was purchased by appellant.

Upon the foregoing facts, it is vigorously insisted by appellant's counsel, that by reason of the breaches of the warranty of Russell & Co., there was such an absolute and total failure of the only consideration for the notes and mortgage in suit that the court ought to have found thereon for the appellant, as its conclusions of law. There would be some foundation for this claim of appellant's counsel if the court had found as a fact that the warranty of Russell & Co., upon which appellant predicated his defence herein, was absolute, unconditional and unlimited in its terms. Of course, it was competent for the parties to contract with each other in relation to the extent, terms and conditions of the warranty, and to impose such limitations and restrictions thereon as they might mutually agree upon. It is claimed by appellant, and the court found, that Russell & Co. made first a verbal warranty and afterwards a written warranty of the machinery sold to and purchased by appellant. There were two findings of the court in relation to the verbal warranty, and it is upon this verbal warranty that appellant's counsel chiefly, if not wholly, rely for the reversal of the judgment. The court found first, that appellee's agents, McCandless and Myers, in their negotiations with appellant for the sale to him of the machinery, verbally warranted such machinery to be well made and of good material, and, with proper man-

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agement, capable of doing as good work as similar articles of other manufacturers. Afterwards the court seems to have concluded that its finding, in regard to the verbal warranty, was not sufficiently full or explicit, and made the further finding that the verbal warranty was made by McCandless and Myers, and was, in substance, the same as that named in the written and printed order, upon which appellee delivered to appellant the machinery mentioned in the complaint.

Appellant's counsel claim, in argument, that in considering this case, with reference to the verbal warranty, we ought to disregard this further finding of the court, but this we could not do. There is no conflict between the two findings of the court in relation to the verbal warranty, and the second might properly be regarded as the supplement merely of the first finding. If we had found it necessary to consider the verbal warranty, in the decision of this case, we would hold that the two findings of the court ought to be construed together, and, thus construed, it would appear that the verbal warranty was subject to the same conditions, limitations and restrictions as the written warranty. But it appears, from the findings of the court, that the verbal warranty was a part of the preliminary negotiations between appellee's agents and appellant for the sale to and purchase by him of the machinery mentioned in the complaint. These negotiations were afterwards consummated by appellant's execution of the written and printed order, mentioned in the court's special finding of facts, and the appellee's acceptance of and action upon such order. Thereafter, such written and printed order became the mutual, valid and binding contract of both appellee and appellant, in relation to the machinery mentioned therein. This is settled by our decisions. *Fairbanks v. Meyers*, 98 Ind. 92; *Herrman v. Babcock*, 103 Ind. 461; *Chicago, etc., R. W. Co. v. Derkes*, 103 Ind. 520. When this written and printed contract was thus executed, all verbal negotiations or agreements, by or between the parties, which preceded or accompanied its execution, were merged therein,

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and such contract became and was the exclusive evidence of the only covenants and agreements, in relation to the machinery described therein, by which the parties ultimately bound themselves. *Ice v. Ball*, 102 Ind. 42.

In such written and printed contract, the appellee's warranty of the machinery was expressly limited to the period of "ten days of first use," and it was expressly stipulated that if the machinery, or any part thereof, should fail to fill the warranty within that period of time, written notice of such failure should be given the appellee, at Massillon, Ohio, and to the agent through whom the machinery was purchased. The court found that the machinery failed to fill the warranty, on the first day of its use, but did not find that written notice of such failure had ever been given the appellee or to its agent. It was further stipulated in such contract, that continued possession or use of the machine, after the expiration of the ten days, should be conclusive evidence that the warranty was fulfilled to the satisfaction of the appellant. The court found the facts to be, that appellant had continued in the use of the machine for a period of two months, and had continued in the possession of the machine down to the date of the final hearing of this cause. Of course, upon such facts as these, the trial court was compelled to find, as its conclusion of law, that appellee must recover the amount due on his notes and mortgage. The fact found by the court, that appellant executed such contract without reading it or having it read to him, only shows inexcusable negligence on his part, and does not aid his defence.

We are clearly of the opinion that, upon the facts specially found, the court did not err in its conclusions of law.

Appellant's counsel also insist that the trial court erred in refusing to submit the issues in this cause to a jury. We do not think this alleged error is properly before us, as neither appellant's motion for a trial by jury, nor the ruling of the court thereon, were made parts of the record either by bill of exceptions or by an order of court. But if the question was

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properly presented here, we would hold that there was no error in the court's refusal of a jury trial. The case is one that, prior to the 18th day of June, 1852, was of exclusive equitable jurisdiction, and, under section 409, R. S. 1881, the issues of law and issues of fact in such a case must be tried by the court. *Carmichael v. Adams*, 91 Ind. 526; *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487; *Israel v. Jackson*, 93 Ind. 543; *Lake v. Lake*, 99 Ind. 339.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Jan. 23, 1886.

No. 12,344.

WELTY v. THE INDIANAPOLIS AND VINCENNES RAILROAD COMPANY.

RAILROAD.—Statutory Action.—Contributory Negligence.—Contributory negligence is not a defence to an action based upon the statute imposing upon railroad companies the duty of fencing their tracks.

SAME.—Cattle-Guards.—The failure to construct cattle-guards, where it is the duty of the railroad company to construct them, is regarded as a failure to fence.

SAME.—Abandonment of Animal by Owner.—An owner who abandons his animal can not recover, although it enters upon the track of a railroad, and is killed, at a place where the company has failed to perform its statutory duty by fencing its track.

SAME.—Where the borrower of a horse, while intoxicated, rides the animal along a highway to a railroad crossing, and, there being no fence or cattle-guard as required by statute, the horse turns and proceeds upon the track until killed by an approaching train, the railroad company is not liable to the owner in an action based upon the statute requiring such companies to keep their tracks securely fenced.

DRUNKENNESS.—*Not Available to Avert Consequence of Act.*—Voluntary drunkenness is not available to avert the usual and natural consequence flowing from a man's act, and a drunken man will be held to the same measure of responsibility as a sober one, and his actions judged by the same standard, except in case of contracts.

Welty v. The Indianapolis and Vincennes Railroad Company.

From the Morgan Circuit Court.

W. R. Harrison and *W. E. McCord*, for appellant.

S. O. Pickens, for appellee.

ELLIOTT, J.—The appellant was the owner of a mare of the value of \$150 on the 30th day of September, 1882, and on that day lent her to Thomas King to ride to Martinsville. King became intoxicated while at that place, and was in that condition upon his way from that town to the appellant's house. The mare, with King as her rider, travelled along the public highway leading to the house of the appellant, but when she came to the place where the highway crossed the track of the appellee's railroad, left the highway and travelled along the railroad for about eight hundred feet. An approaching train frightened her, causing her to run into a trestle work where the train ran upon her and killed her. There were no fences or cattle-guards at the highway crossing, and nothing to prevent the mare from entering upon the railroad track. Upon a special verdict, setting forth these facts, the trial court gave judgment in favor of the appellee.

The appellant founds his cause of action entirely upon the statute requiring railroad companies to securely fence their tracks, and unless the facts stated in the special verdict make a case within the statute, he can not recover, for a plaintiff must recover upon the theory on which his complaint is framed or not at all. *Leeds v. City of Richmond*, 102 Ind. 372; *City of Logansport v. Uhl*, 99 Ind. 531 (50 Am. R. 109); *Sims v. Smith*, 99 Ind. 469, see p. 477 (50 Am. R. 99); *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Western Union Tel. Co. v. Young*, 93 Ind. 118; *Mescall v. Tully*, 91 Ind. 96, and cases cited.

Contributory negligence is not a defence to an action based upon the statute imposing on railroad companies the duty of fencing their tracks. The disregard of this duty is not simply negligence on the part of a railroad company, but it is a tort, for it involves the direct violation of a positive and ex-

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plicit law. So the statute treats the disregard of duty, and so our decisions have uniformly declared. *Jeffersonville, etc., R. R. Co. v. Ross*, 37 Ind. 545, see p. 549; *Louisville, etc., R. W. Co. v. Cahill*, 63 Ind. 340; *Louisville, etc., R. R. Co. v. Whitesell*, 68 Ind. 297. A very forcible assertion of this doctrine is contained in the opinion of Judge COOLEY, in *Flint, etc., R. W. Co. v. Lull*, 28 Mich. 510. This rule, of course, only applies to cases where the railroad company is bound to fence, for, if the animals killed entered upon the track at a place where the railroad company was not bound to fence, then the contributory negligence of the owner will prevent a recovery. *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486. The rule declared in the case last cited, that if stock are killed at a point where the railroad company was not bound to fence a recovery will be defeated by contributory negligence, does not apply here, for the place where the mare entered upon the track was one which the appellee was bound to protect by cattle-guards, and the failure to construct suitable guards where it is the duty of the railroad company to construct them, is regarded as a failure to fence. *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91. What we have said shows that the element of contributory negligence exerts no influence upon the decision of this case, and that our judgment must be given irrespective of that element.

An owner who abandons his animal can not recover, although it entered upon the track of a railroad, and was killed, at a place where the company failed to perform its statutory duty by fencing its track. *Knight v. Toledo, etc., R. W. Co.*, 24 Ind. 402; *Jeffersonville, etc., R. R. Co. v. Dunlap*, 29 Ind. 426; *Corwin v. New York, etc., R. R. Co.*, 13 N. Y. 42, see opinion, DENIO, J., p. 54.

Sound principle supports this rule. If an owner were permitted to voluntarily put his domestic animals in a situation where it was almost certain that they would be killed by passing trains, and yet, in the event that they were killed, recover from the railroad company, it would open the way to

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great frauds, since it would enable the owner to recover for property voluntarily exposed to destruction; but this would not be the only evil result, for a further evil consequence would be that the temptation to get rid of animals not needed or not useful at the expense of the railroad company would endanger the safety of those who travel upon our railroads. Public policy requires that a man who voluntarily puts his property in a place where it is certain that it will be destroyed shall not receive assistance from the courts. A man who willingly abandons his property to destruction, or purposely exposes it to a known danger, has no right, either in law or morals, to invoke the assistance of the courts of justice to secure pay for it. But, in order to deprive the owner of his rights under the statute, there must be something more than mere contributory negligence; there must be a voluntary abandonment of his property or an intentional exposure of it to danger. This intention, to be sure, need not be expressed in direct words or acts; it may be inferred from circumstances, but it must nevertheless exist. When it does appear that it exists, then, under the maxim *volenti non fit injuria*, there can be no recovery. If a man consents to the destruction of his property he can not recover its value.

If an owner rides his horse upon a railroad track, he must, under the reasoning of the cases to which we have referred, be deemed to have voluntarily exposed it to destruction. Such an act implies an assent to its destruction and indicates an abandonment of it. The omission of the railroad company to do what the law enjoins does not authorize an owner of property to place it on the track, for the Legislature can not be presumed to have intended that one who abandons his property shall nevertheless recover its value. To us it seems clear, that if the appellant had ridden the mare upon the defendant's track, he would not have the slightest grounds upon which to base his claim for the value of his property. Such an act is something more than mere negligence; it is a wilful trespass upon the property of another, exposing the trespasser

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to imminent danger. He who voluntarily puts his property in such a dangerous position assents to its destruction, for the maxim is, that a man is presumed to intend the natural consequences of his act. The act of riding upon a railroad track is not defensible upon any ground save that of necessity, and he who does such a wrongful act without the warrant of necessity must abide the consequences. The case we have stated furnishes far stronger evidence of an abandonment of property than that of *Knight v. Toledo, etc., R. W. Co., supra*, and yet it was there said: "Under such circumstances, we do not think the party injured can be heard to complain in a court of justice; it would be a violation of one of the maxims of the law."

In *Jeffersonville, etc., R. R. Co. v. Dunlap, supra*, it was said: "So, very clearly, if the owner drives his animal upon the track, that it may be killed, or allows it to wander under such circumstances as justify the conclusion that he desires that result, it can not be supposed that the Legislature intended that the railroad company should be liable, on account of its failure to fence."

We assume on the strength of these authorities, and the principles which we have stated, that, if the appellant had himself ridden the mare upon the track, he could not recover.

The borrower of the mare stood to the railroad company as the owner, for the latter had placed it in the borrower's possession and control. We suppose it to be too clear for debate, that if the borrower had, while sober, purposely and deliberately ridden the mare upon the track in front of an approaching train, the company would not be liable. It would shock every just mind to affirm that a railroad company must pay for property placed in certain danger of destruction by the man to whom the owner had entrusted it. If the act of the person placed in possession of the property would, in the case supposed, relieve the company from liability, it must have that effect in all cases where the injury to the property is due to the wrongful act of the person in possession in voluntarily

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exposing it to danger. Whether the person in possession of a horse rides in front of an approaching train or rides upon the track where there is no means of escaping from trains, he must, in either case, be deemed to have voluntarily exposed the property to danger, and, in contemplation of law, to have consented to its destruction, for he is presumed to intend the natural consequences of his acts. We assume, then, that the appellant has no cause of action if the act of King can be regarded as such a reckless and intentional exposure of the mare to danger as constituted an abandonment of the property or implies consent to its destruction.

King's act in riding upon the track must be deemed to imply consent to the destruction of the mare, unless the fact that he was intoxicated is a sufficient cause for holding that the presumption that he did not intend the natural consequences of his act can not prevail against him. It is clear upon principle and authority that it can not have that effect. Drunkenness is no excuse for crime, and if it can not be used as an excuse by one accused of crime it is not conceivable that it can be used where only property rights are involved to avert consequences which usually result from a wrongful or negligent act. *Goodwin v. State*, 96 Ind. 550, and cases cited. In *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478 (49 Am. R. 469), it was held that the representative of a man who met his death while committing an assault and battery, could not urge as a cause for averting a forfeiture of a policy of life insurance that the insured was drunk at the time he committed the unlawful act. Judge COOLEY says: "The fact that a tort was committed while a defendant was intoxicated is no excuse whatever." Cooley Torts, 114. In another treatise it is said: "Intoxication should not benefit any man." Shear. & Redf. Neg., section 29, n.

The adjudged cases agree that intoxication will not excuse a man from the exercise of the care and diligence required of all citizens. *Yarnall v. St. Louis, etc., R. W. Co.*, 75 Mo.

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575; *Fitzgerald v. Weston*, 52 Wis. 354; *Denman v. St. Paul, etc., R. R. Co.*, 26 Minn. 357; *Beach Cont. Neg.* 205; *Thompson Neg.* 430. The principle deducible from these authorities is, that voluntary drunkenness is not available to avert the usual and natural consequences flowing from a man's act, and from this deduction flows the ultimate conclusion that a drunken man will be held to the same measure of responsibility as a sober one, and his actions judged by the same standard, except in cases of contract. As this is the rule, the act of King in riding the appellant's mare upon the railroad track must be treated as if it had been done by a sober man, and, thus treated, it is evident that there can be no recovery by the appellant. This result is just in itself and required by the highest considerations of public policy. If it were otherwise, then a drunken man might purposely ride his horse upon a railroad track in front of a locomotive and secure a recovery by pleading his own wrong in voluntarily making himself drunk. Such a result no principle of right or justice would tolerate. If King had been sober, there could be no doubt that the appellant could not recover, and as King's drunkenness can not be permitted to change the nature of his act, it conclusively follows that his drunkenness will not avail to change the results that flow from that act. The same rule applies to him drunk as to him sober. If it were otherwise, a premium would be put on drunkenness, and that the law has never yet done, and, it is not hazardous to affirm, never will do.

Judgment affirmed.

Filed Jan. 21, 1886.

 Conner v. The Citizens Street Railway Company.

No. 11,982.

CONNER v. THE CITIZENS STREET RAILWAY COMPANY.

SPECIAL VERDICT.—*Province of Jury.*—*Practice.*—In framing and returning a special verdict, the whole duty of the jury is discharged when they have found and set forth, in an orderly and intelligible manner, all the principal facts which were proven within the issues submitted to them.

SAME.—*Issue Involving Negligence.*—When, upon an issue involving negligence, the principal or ultimate facts are determined by the jury, it then becomes the function of the court to decide, as a question of law, upon the facts found, whether or not the party to whom negligence is imputed was negligent.

SAME.—In an action for damages, growing out of the alleged negligent conduct of the defendant, a paragraph of the special verdict which recites "that the conduct of the plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not wholly contribute to said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant, driver of said car," contains nothing more than inferences or conclusions, and will not be regarded as a finding of facts.

NEGLIGENCE.—*When a Question of Law.*—Where the facts are undisputed, or where the jury have agreed upon and returned a special verdict setting forth the principal, contested facts, it is the province of the court to settle the question of negligence as a question of law.

SAME.—*Contributory Negligence.*—*Getting on and off Street Car when in Motion.*—The rules applicable to persons getting on and off cars operated by steam are not to be applied in full force to street railways operated by horse-power. A person having the free use of his faculties and limbs, and having given proper notice of his desire to be taken up, the car having slackened its speed in the usual manner, it is not negligence for him to attempt to get on while it is moving slowly.

SAME.—In an action against a street railway company for personal injuries, alleged to have been occasioned by the negligent conduct of defendant's driver, the facts were that the plaintiff was standing on a crossing, where passengers were usually taken, and signalled an approaching street car, the team attached to which was being driven in a trot; that on receiving the signal the driver slackened the speed of the team, so that when the car reached the plaintiff it was moving slowly; that as the plaintiff was in the act of stepping upon the car the driver struck the team, causing it to start rapidly, thereby suddenly jerking the car, so that the plaintiff was thrown violently to the ground and injured.

Held, that the defendant is liable.

From the Marion Superior Court.

106	69
124	279
124	451
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128	143
128	415
128	417
106	62
132	286
106	69
134	23
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106	62
139	388
106	62
141	380
141	547
142	624
106	62
145	108
146	317
106	62
149	69
106	62
150	688
105	62
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L. Ritter, E. F. Ritter and B. W. Ritter, for appellant.
F. Winter, W. W. Herod and H. C. Allen, for appellee.

MITCHELL, J.—This was a suit brought by John B. Conner against the Street Railway Company to recover damages for personal injuries sustained by him on account of alleged negligence on the part of the railway company.

The appellant had judgment upon a special verdict at special term. This was reversed on appeal to the general term, and the record is now here with an assignment that the general term erred in reversing the judgment of the special term.

The questions for decision arise on the special verdict returned by the jury.

Summarized, the material facts returned were: That the railway company, on the 7th day of May, 1883, owned and operated a street railway, for the carriage of passengers over certain streets in the city of Indianapolis. That on the day mentioned three of the defendant's cars, by reason of a mule attached to one of them having balked, had become "bunched," or collected together, at a point on its line, so that they had lost their proper time or interval. An officer of the company, who was upon the front car, directed that it, and the car succeeding it, should be driven rapidly, without stopping to receive passengers, so as to regain their proper distance from each other, and that the third, or rear car, should receive such passengers as should present themselves. Pursuant to direction, the three cars started down College avenue. Two of them were driven in a fast trot. The first car passed the point where the plaintiff was standing without slackening its speed. When the second, as we infer from the finding, approached the footway at the crossing where the plaintiff was standing, that being the usual place for receiving passengers, the plaintiff, as the finding recites, "gave notice to the agent, an employee in charge of said car, that he desired to take passage therein as a passenger." That the car was one of the regular vehicles for the carriage of passengers, and

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that there was room in the car, so that he could have been carried without inconvenience to himself, the defendant, or to other passengers therein. It is then found that the plaintiff was not "instructed by an officer or agent of the defendant to get upon said car." That as the car came up to where plaintiff stood its speed was slackened from a rapid trot to a walk, and when the rear step came about over the walk it was moving slowly. That it was the defendant's custom to slacken the speed of its cars to let men passengers on or off while in motion, as the plaintiff well knew. That the plaintiff attempted to enter the car by the rear door, and stepped one foot on the step, and partially took hold of the iron railing with one hand, when the driver struck the mules with his whip, suddenly increasing the speed of the car, which caused plaintiff to be violently thrown on the ground, from which he sustained severe injuries and bruises. The conclusion of the finding of what purports to be the facts is as follows:

"12th. That the conduct of plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not *wholly* contribute to said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant, driver of said car."

In determining the legal value and quality of the facts found, the paragraph above set out is not to be regarded as a finding of facts. It contains nothing more than inferences or conclusions, drawn by the jury upon the precedent facts, and upon these it was not the province of the jury, in their special verdict, either to express opinions or draw conclusions. In framing and returning a special verdict, the whole duty of the jury is discharged when they have found and set forth, in an orderly and intelligible manner, all the principal facts which were proven within the issues submitted to them. *Pittsburgh, etc., R.R. Co. v. Spencer*, 98 Ind. 186; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

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"A special verdict is that by which the jury find the facts only, leaving judgment thereon to the court." Section 545, R. S. 1881.

When, upon an issue involving negligence, the principal or ultimate facts are determined by the jury, it then becomes the function of the court to decide, as a question of law upon the facts found, whether or not the party to whom negligence is imputed was negligent.

A civil case can not be conceived of in which it is the province of the jury by special verdict to determine the facts, and also to draw inferences in the nature of legal conclusions upon the facts found. When the jury find and return a special verdict, it must then be considered that the facts in that case are no longer in dispute. They are ascertained and settled by the special verdict. Unless it can be maintained that the inference or conclusion which may be drawn from all the ascertained and undisputed facts is also a fact, it must follow that it is not the province of the jury to draw inferences or state conclusions. It is settled by decisions so numerous that we need not cite the cases, that where the facts are undisputed it is the province of the court to settle the question of negligence as a question of law. This must be so in the nature of things. If it is otherwise, there is a class of cases in which upon the undisputed facts the court is incapable of reaching a conclusion, or of determining whether such facts constitute negligence or not. As in cases where the question is whether, upon an ascertained state of facts, the conclusion of fraud, conversion of goods, payment or probable cause for the institution of a suit may be drawn, so, where the question is whether negligence has intervened when the facts are ascertained by the instrumentality selected for that purpose, the court must determine whether, in law, negligence can be predicated upon the facts ascertained. *Louisville, etc., R. W. Co. v. Balch, post*, p. 93.

Concede that in some sense negligence is, as it is some-
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times said to be, a mixed question of law and fact, it can not be so after the facts are ascertained. In cases involving negligence, as in all other civil cases, a point must be reached at some time when the facts and the law are to be considered as separate and distinct, when the litigants have the right to invoke the judgment of the court, and require it to determine whether, upon the facts as they are agreed to be, the law declares that negligence intervened. Such a point, we think, is arrived at when the jury have agreed upon and returned to the court in a special verdict the principal, contested facts in issue.

Without entering farther upon ground which has often before been debated over, we are not willing to admit that a case can arise in which the court must stand mute in the presence of undisputed facts, without authority to declare the law.

Eliminating the unauthorized conclusions drawn by the jury, we proceed to the consideration of the facts properly returned in the special verdict. Upon the facts so returned, we think it clearly appears that the defendant was guilty of negligence, and that the plaintiff was without contributory fault.

While the plaintiff stood upon the crossing at the usual place where passengers were taken up, one car passed rapidly, without slackening its speed. Seeing the next approach at a rapid trot, he gave notice to the person in charge that he desired to be taken up. The speed of the car was slackened so that when the rear end came opposite the crossing it was moving slowly. It can not be assumed that the plaintiff had information that the approaching car, one of the regular vehicles on the line, was not to take passengers. Being at the usual place where passengers were taken up, and having given notice to the person in charge of the car that he desired to be taken up, it was the plain duty of the driver, or person in charge, either to afford him reasonable opportunity to enter the car, or to notify the plaintiff, either by continuing the rapid pace, or in some other way, that he would not be taken.

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Instead of giving any sign that he would not be taken, the speed of the car was slackened, so that it was moving slowly when he attempted to get on. Having received a signal and slowed up in a manner to invite the plaintiff to get on, it was a clear act of negligence in the driver, or person in charge, not to observe the plaintiff, if he did not observe him, and, while he was getting on the car in a manner in which the defendant usually received such passengers, to cause the car to be "jerked" forward, as the jury found.

Having given notice of his desire to be taken on board the car, and its speed having been slackened so that it was apparently safe under ordinary circumstances, it was not negligence in the plaintiff to attempt to get on while the car was so in motion. He had a right to rely upon the watchfulness and care which it was the duty of the driver to bestow toward persons about to take passage, under the circumstances, and was not bound to anticipate that the car which he was getting upon might be "jerked," forward by an act of the driver, so as to put him in danger. *Chicago City R. W. Co. v. Mumford*, 97 Ill. 560.

The rules applicable to persons getting on and off cars operated by steam are not to be applied in all their rigor to street railways operated by horse-power. A person having the free use of his faculties and limbs, and having given proper notice of his desire to be taken up, the car having slackened up in the usual manner, it is not negligence for him to attempt to get on while it is moving slowly. *Murphy v. Union R. W. Co.*, 118 Mass. 228; *Wyatt v. Citizens R. W. Co.*, 55 Mo. 485; *Thomp. Carriers*, 443, 444.

The judgment of the general term is reversed, with costs.

Filed Jan. 26, 1886; petition for a rehearing overruled April 14, 1886.

Beard v. Puett et al.

No. 12,083.

BEARD v. PUETT ET AL.

JUDGMENT.—*Set-Off.—Equity.*—It is only when equity and good conscience require it that a court can order one judgment to be set off against another.

SAME.—*Husband and Wife.—Assignment of Judgment to Wife to Reimburse Her for Money Advanced to Prosecute Action.*—Where a husband assigns a judgment to his wife to reimburse her for money advanced to him to aid in the prosecution of the action in which it was obtained, the judgment defendant can not, in an action subsequently brought for that purpose, offset judgments held by him against the husband against the judgment so held by the wife.

From the Montgomery Circuit Court.

T. E. Ballard, M. E. Clodfelter and A. D. Thomas, for appellant.

V. Carter, G. W. Paul and J. E. Humphries, for appellees.

NIBLACK, C. J.—On the 27th day of May, 1881, Jacob Beard recovered a judgment, in the Montgomery Circuit Court, in an action for an assault and battery against Elisha A. Puett, Samuel D. Puett and Johnson R. Darroch, for the sum of \$500 and costs of suit since taxed at \$239.35. At the time of the rendition of that judgment the judgment defendants were the owners and holders, by assignment, of certain judgments, theretofore rendered against Beard, which, in the aggregate, amounted to more than the judgment in favor of the latter against them. Immediately after the entry of the judgment first above referred to, Thomas, Shelton and Courtney, Beard's attorneys, filed liens against it for the fees respectively claimed by them for obtaining the judgment. On the same day, that is, on the day the judgment was rendered, Puett and others, the judgment defendants in that judgment, filed the complaint upon which this action has been prosecuted against Beard, demanding that the judgments held by them by assignment, as above set forth, be set off against his judgment so obtained against them. Thomas, Shelton and Courtney were also made defendants to

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answer as to their interests in Beard's judgment. On the 8th day of June, then immediately ensuing, Beard assigned his judgment to Olivia Beard and she was soon afterwards, on her own application, made a party defendant to this proceeding. She thereupon resisted the proposed set-off of judgments upon the ground that she had supplied her co-defendant, Jacob Beard, with the means necessary to prosecute his action for damages, with the agreement and understanding that the judgment when obtained was to belong and to be assigned to her. Upon a hearing the circuit court declined to grant the relief demanded and rendered judgment accordingly. So much of that judgment as was operative in favor of Olivia Beard was reversed by this court. See *Puett v. Beard*, 86 Ind. 172 (44 Am. R. 280).

After the cause was remanded, Mrs. Beard amended her answer by averring that at the time she furnished Jacob Beard the means to prosecute his action, she was, and had ever since continued to be, his wife. At the ensuing, or last, trial, the circuit court made a special finding of the facts, which, amongst other things, found that at the time Jacob Beard commenced his action against the plaintiffs herein he was destitute of means to prosecute it effectively, and was then, as he had ever since continued to be, wholly insolvent and destitute of means; that Mrs. Beard advanced to, and furnished, him about the sum of \$200 to enable him to prosecute his action to a successful termination, being at the time, as she still continued to be, his wife, and being in that way interested in his estate; that the plaintiffs herein had, in the meantime, paid and discharged the liens held upon the judgment against them by Thomas, Shelton and Courtney respectively, but there was no finding as to whether there were any terms or conditions, as to the ultimate ownership of the judgment which might be obtained, connected with Mrs. Beard's advances to her husband to enable him to prosecute his action against the plaintiffs as averred in her answer. Neither was there any finding as to when process was issued

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against, or served upon, Jacob Beard in this proceeding, nor as to whether Mrs. Beard had become a party to defend herein when the judgment was assigned to her.

As resulting from the facts as found by it, the circuit court came to the conclusion that so much of the judgments held by the plaintiffs as was necessary for the full discharge of the balance due on the judgment recovered by Jacob Beard, ought to be set off against, and applied in satisfaction of, that judgment, and it was, in consequence, so ordered and adjudged by the circuit court.

At the former hearing the material defect in Mrs. Beard's defence was held to be, that, in the absence of an averment and proof that she was the wife of Jacob Beard, no privity with him, either of person or estate, could be presumed, and that hence the alleged agreement upon which she furnished the latter money to prosecute his suit, was champertous and void. But, as has been seen, Mrs. Beard's answer has been amended in that respect, and it was specially found at the last trial that she was, at the time she furnished the money, as she still continues to be, Jacob Beard's wife.

The opinion promulgated at the former hearing referred to makes it the law of this case, as it doubtless is as applicable to other cases, that a court can only order one judgment to be set off against another when equity and good conscience require that such a set-off shall be made, and the only question now presented is, who, upon the facts as found at the last trial, holds the superior equity in the judgment in controversy?

If the circuit court had found that the advancements of money made by Mrs. Beard were upon an agreement with her husband that she should become the owner of the judgment which might thereby be obtained, no serious question could be made, as we believe, upon her superior equity. But, even in the absence of such a finding, we feel constrained to accord to her upon the facts which were specially found the su-

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perior equity, standing as she does in the relation of assignee of the judgment. There is a privity of person between husband and wife, and, to a limited extent at least, a privity, that is to say, a common interest in the estates of each other. As in other cases of persons between whom a privity of person exists mutual and reciprocal relations are imposed. A wife may assist her husband, as the husband may the wife, in redressing wrongs either to his person or to his property, and, at her option, may seek reimbursement for such assistance by any legitimate means.

When Mrs. Beard advanced money to her husband to enable him to prosecute his action, whether in obedience to what she considered to be only a plain duty, or upon some special agreement for her indemnity, she acquired the right to be reimbursed out of his estate whenever means for that purpose became available. The assignment of his judgment by Jacob Beard to his wife was consequently nothing more than an effort on his part to give her a preference as one of his creditors. Conceding, but not deciding, that the commencement of this proceeding by the appellees before the assignment of the judgment might, by reason of their greater diligence, have conferred upon them the better claim to an appropriation of the judgment, there was, as has been intimated, nothing found by the circuit court from which it can be inferred that this was, in legal contemplation, a pending proceeding as either against Jacob Beard or his wife when the judgment was assigned to her. There was, therefore, nothing in the facts attending the transaction as they presumably existed to prevent Jacob Beard from giving a preference to his wife as one of his creditors. Having thus in a legitimate way been made the assignee and holder of the legal title to the judgment, Mrs. Beard's claim to its equitable ownership became at once the prevailing claim.

The judgment below is reversed with costs, and the cause is remanded with instructions to the circuit court to re-state

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its conclusions of law in accordance with this opinion, and to render judgment upon the conclusions of law thus re-stated in favor of Olivia Beard, the appellant.

Filed Jan. 26, 1886.

No. 12,323.

CRAIGHEAD v. DALTON ET UX.

JUDGMENT.—*Former Adjudication.*—*Default.*—*Married Woman.*—*Mortgage of Land Derived from First Husband.*—*Action for Possession.*—While married a second time a woman executed a mortgage on land derived from her first husband. After her death a suit to foreclose the mortgage was brought and the children by the first marriage were made parties defendants to answer as to their interest. They were defaulted, and a decree of foreclosure was entered and the land was sold. Action by them to recover possession of the land.

Held, that the action is barred by the decree in the foreclosure suit.

From the Tipton Circuit Court.

M. F. Cox, J. P. Kemp, C. E. Cox and E. P. Kellogg, for appellant.

R. B. Beauchamp and G. H. Gifford, for appellees.

ELLIOTT, J.—The appellant alleges in his complaint that John W. Craighead died intestate in November, 1869, leaving as his heirs his widow, Martha Craighead, and his children, Robert B. Craighead and Charles Craighead; that John W. Craighead died the owner of the real estate described in the complaint; that this real estate was set apart to Martha Craighead as the widow of the intestate; that Martha Craighead married David J. George on the 17th day of September, 1872, and remained his wife until her death, in December, 1875; that the appellant's brother, Charles Craighead, died in October, 1878. The prayer of the complaint is for the possession of the land.

105	72
124	558
105	72
129	128
105	72
130	402
105	72
181	18
132	576
182	606
105	72
140	442
105	72
149	394
152	170
105	72
153	496
105	72
155	681
156	571
156	572
156	574
105	72
162	8

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To this complaint the appellees answered, in substance, that on the 14th day of January, 1875, Martha George and David J. George executed to David Illges a mortgage on the land to secure the sum of five hundred dollars; that on the 17th day of January, 1876, Illges filed his complaint for the foreclosure of the mortgage; that Robert B. and Charles Craighead were made parties, and were served with process; that Robert B. Craighead suffered a default, and Charles Craighead answered by a guardian *ad litem*; that a trial was had and a decree rendered foreclosing the interests of all the defendants to the suit, and that on this decree the land was sold.

The decree in the foreclosure suit adjudicated the rights of all the parties properly before the court. Since the adoption of the code it has been the rule in this State that where parties are brought into court upon a complaint to foreclose a mortgage, and are challenged to assert such interest or title in the land as they may have, a decree adjudging that they have no title or interest will conclude them. One of the leading purposes of a suit to foreclose a mortgage is to secure such a decree as will enable the plaintiff to sell all the right and title that his mortgage covers, and enable a purchaser at the sale to ascertain what title it is that he buys. To attain this end it is necessary that all the claims held against the mortgaged premises should be adjusted in one suit. This the spirit of our code requires, for it makes ample provision for bringing all the interested parties into court, and for adjusting all conflicting claims and equities. The rule is a salutary one; it tends to repress litigation, gives confidence in public records, secures respect for judgments and decrees, and invests sheriff's sales with strength and certainty that do much to promote the interests of both debtor and creditor. But we need not pursue this discussion, for the question has often received consideration, and must be regarded as firmly settled. *Ewing v. Patterson*, 35 Ind. 326; *Greenup v. Crooks*, 50 Ind. 410; *Davenport v. Barnett*, 51 Ind. 329; *Harrison v.*

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Phoenix M. L. Ins. Co., 83 Ind. 575; *Ætna Ins. Co. v. Finch*, 84 Ind. 301; *Ulrich v. Drischell*, 88 Ind. 354, see auth. cited p. 360; *Hose v. Allwein*, 91 Ind. 497, *vide* p. 501; *Woodworth v. Zimmerman*, 92 Ind. 349; *Masters v. Templeton*, 92 Ind. 447; *Randall v. Lower*, 98 Ind. 255; *Barton v. Anderson*, 104 Ind. 578.

The appellant was not made a party simply as the heir of his deceased mother, but he was made a party to answer as to his interest in the mortgaged premises. He was challenged to assert his interest, and to show why the land should not be sold to pay the mortgage debt, and, not having asserted his rights when offered a full opportunity to do so, he can not now successfully assert any claim existing at the time the foreclosure suit was instituted.

The complaint in the foreclosure suit did not call the appellant into court in any particular capacity, nor did it require him to answer as to an interest derived from a particular source, but it called him into court to answer generally and challenged him to assert such rights as he had. The main averment of the complaint in the foreclosure suit was the execution of the mortgage, and this, of course, included the element of the power to execute it, so that the question of the power to execute the mortgage was in issue. It has often been decided that a judgment will bind a married woman although the instrument upon which the action was founded would have been adjudged void had a defence been made, and that principle applies here, for the power to execute the mortgage was in issue and the decree is conclusive. To hold otherwise would tend to make titles insecure, and to impair confidence in the decrees and judgments of the courts. The true and just rule is that a party who is given his day in court must meet and litigate all the issues tendered by the complaint. This principle is a familiar one in this court, for it was declared in the early case of *Fischli v. Fischli*, 1 Blackf. 360, and has been reaffirmed in a great number of cases. This is the only rule that will give stability to titles,

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and secure respect for the judgments and records of the court, and we believe justice is promoted by closely adhering to it. While the courts of some other states have departed from it our court has adhered to it for many years, fully recognizing its beneficial effects in its practical operation upon the rights of judgment debtors as well as upon the rights of purchasers of lands sold upon judgments and decrees.

There could have been no right of action in the plaintiff in the foreclosure suit if there was no power to execute the mortgage. His cause of action depended entirely upon the validity of the instrument on which it was founded. In suing upon that instrument and in bringing the appellant into court to join issue upon the complaint, the plaintiff in that suit asked the appellant to litigate the validity of the mortgage and the right to foreclose it, and also to contest the right to sell the land described in it. In decreeing that the mortgage should be foreclosed the court necessarily adjudicated upon these questions, and where a matter has been adjudicated by a court having jurisdiction it is set at rest. It would be unjust to purchasers to permit one who has had an opportunity to make a defence to a mortgage and to assert his interest in the land to come in long afterwards and destroy the title founded on the decree. If that be the law titles founded on judicial decrees would be of little value, but it is not the law. It is more just that he should be the sufferer who neglects to avail himself of an opportunity to defeat a mortgage, than that a purchaser who buys upon the faith of a decree of a court should lose his purchase-money.

There can be no doubt that the appellant might have litigated every question affecting the rights of the mortgagee and his own in the foreclosure suit, and having this right it was his duty to do so. This is within the rule laid down in *Fischli v. Fischli*, *supra*, where it was said, of the doctrine of former adjudication, that "This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case."

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This doctrine was applied to a case in principle essentially the same as the present, in *Elwood v. Beymer*, 100 Ind. 504. But the case before us does not require us to go so far as the cases referred to, for the point directly in issue in the foreclosure suit was the validity of the mortgage which constituted the basis of the action, and the relief prayed was the foreclosure of the mortgage and the sale of the land mortgaged, so that no decree could be rendered without directly adjudicating upon these matters.

There is a limited class of cases to which the general rule upon the subject of a former adjudication does not apply. That class is composed of cases in which the party is sued in a particular capacity, and is held to be bound only in the capacity in which he was sued. *Unfried v. Heberer*, 63 Ind. 67; *Elliott v. Frakes*, 71 Ind. 412; *Lord v. Wilcox*, 99 Ind., 491; *Bigelow Estop.* 65; *Freeman Judg.*, section 156.

The case under examination, however, is not a member of that class, for the reason that the appellant was not sued in a particular capacity, but was brought into court to answer as to the issue tendered by the complaint, in his own right. Where a party is brought into court to answer as to his interest in his own right, he must do so, or the penalty of his neglect will be a conclusive judgment. *Carver v. Carver*, 97 Ind. 497; *Stockwell v. State, ex rel.*, 101 Ind. 1; *Lantz v. Maffett*, 102 Ind. 23. This doctrine is forcibly illustrated by the case of *Corcoran v. Chesapeake, etc., Co.*, 94 U. S. 741, where it was held that one who was a party both as a trustee and as a *cestui que trust* was bound by the decree.

The cases referred to in the able brief of appellant's counsel do not meet the question here presented, for the appellant was challenged to present whatever claim he had, and was asked to join issue upon the validity and effect of the mortgage, and, having failed to take advantage of his day in court, is concluded.

We can not examine the rulings in the foreclosure suit to ascertain whether they were or were not erroneous, for, con-

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ceding that they were erroneous, still the judgment can not be impeached in this collateral manner. It is only judgments that are absolutely void that can be overthrown in a collateral attack.

What we have said disposes of all the legal questions in the case, and it is unnecessary to examine in detail the errors assigned.

Judgment affirmed.

Filed Jan. 23, 1886.

 No. 11,933.

ROSZELL v. ROSZELL.

PURCHASER PENDENTE LITE.—Where a purchaser *pendente lite* is not entitled to defend his right in his own name, he may do so in the name of his grantor.

SAME.—*Supreme Court.*—*Judgment.*—*Infant.*—*Appeal after Removal of Disability.*—*Confession of Errors.*—*Collusion.*—*Defence by Grantee in Name of Grantor.*—R., claiming to own land which had been deeded to his infant son, brought an action against the latter to have his title quieted, which was done. R. then sold the land by warranty deed to G., and the latter to P. After R.'s son became of age he appealed from the judgment in favor of his father to the Supreme Court. P. filed an application to be allowed to defend, either in his own name or in the name of R., showing his interest, and alleging that R. is insolvent, and that he and his son had colluded to procure a reversal of the judgment, and that R. had executed a confession of errors. Subsequently a confession of errors was filed.

Held, that the confession of errors should be disregarded, and P. allowed to defend in R.'s name.

From the Decatur Circuit Court.

C. Ewing and *J. K. Ewing*, for appellant.

F. E. Gavin, for appellee.

ZOLLARS, J.—While in the army during the late war, appellee contracted for the purchase of the real estate in controversy in this action. Before his return, it was deeded to

305	77
181	218
106	77
149	115

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his then infant son, appellant. In 1877, appellee claiming that the property belonged to him, and that the conveyance to the son had been made by mistake, brought an action to recover the property and to have the title quieted in him.

A guardian *ad litem* was appointed for appellant, and such proceedings were had that a commissioner was appointed to convey the legal title to appellee. The commissioner made a deed which was approved by the court, and the title was quieted in appellee. After appellant became twenty-one years old, he took an appeal, and filed the record in this court on the 7th day of October, 1884.

On the 27th day of December, 1884, Edwin S. Porter filed an application to be allowed to contest the assigned errors, either in his own name as a party to the appeal, or in the name of appellee. In this application he sets up under oath, amongst other things, that, on the 7th day of October, 1877, which was subsequent to the judgment above mentioned in favor of appellee, said appellee and his wife sold, and by a general warranty deed conveyed, the real estate to one Mary F. Grant, and that she sold and by warranty deed conveyed the real estate to him, Porter; that appellee, the father of appellant, is wholly insolvent; that they have colluded to procure a reversal of the judgment, and that appellee had executed and delivered to appellant, or to his counsel, a written confession of errors. On the 6th day of January, 1885, there was filed a written confession of errors, and a consent that the judgment might be reversed, signed by appellee, and also a motion by appellant to dismiss Porter's application. This motion is not based upon a denial of the facts set up in Porter's application, but rests upon the assumption that there is no way by which Porter can be made a party in this court, or be allowed to contest the case in appellee's name. It will be seen that after appellee got the title to the real estate quieted in him by the judgment of the court, he sold it and conveyed the legal title thereto by a warranty deed. He thus divested

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himself of all interest in the real estate, which was the subject-matter of the controversy between him and appellant. Being insolvent at the time Porter filed his application, appellee had no interest in the controversy, except as he might, as a matter of honor, desire to protect his grantees. According to the showing in Porter's application, appellee did not have that interest. It is thus manifest that there is no immediate protection for Porter in the controversy, if he needs protection, unless he can in some way prevent the confession of errors by appellee and be allowed to contest the case.

Appellant, being a minor at the time the judgment was rendered against him, had the right to appeal at any time within one year after becoming twenty-one years of age. An appeal is said to be a continuation of the same case. Powell App. Proc. 104. It is not necessary nor proper that we should now decide as to whether or not, for all purposes, Porter should be regarded as a purchaser *pendente lite*, nor in what respect or to what extent his rights might be affected by a reversal of the judgment. These are questions that may hereafter arise in the determination of the ultimate rights of the parties.

Appellant's theory is, that Porter became a purchaser *pendente lite*. For the purpose of a decision upon the application and motion before us, we may adopt that theory to the extent that Porter was a purchaser *pendente lite* in such a sense as that he has a right to defend the action in appellee's name. The law is, that if a deed is made *pendente lite*, or under such circumstances as that the grantee can not defend his right and title to the real property conveyed in his own name, he may do so in the name of his grantor.

The grantor in such cases, by his conveyance, authorizes the grantee to protect his right to the property conveyed, by a suit or defence in the name of the grantor, and in such cases the grantor can neither dismiss the suit nor prevent the de-

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fence. *Steeple v. Downing*, 60 Ind. 478; *Vail v. Lindsay*, 67 Ind. 528; *Ex Parte Railroad Co.*, 95 U. S. 221.

In the last case above, it was said: "A *pendente lite* assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned."

In the case of *Lord v. Veazie*, 8 How. (U. S.) 250, third persons, not parties to the action, but whose rights would be affected by a decision in the case, were allowed to file affidavits and show that the controversy between the parties to the record was not a real one; that their interests were really the same, and that they sought a decision for the purpose of affecting the rights of said third persons. Upon this showing the writ of error was dismissed. See, also, R. S. 1881, section 271.

In the case before us, it is made to appear by Porter's application that appellee has no real interest in the case adverse to his son; that he is colluding with the son for a reversal of the judgment, and that such a reversal may seriously affect Porter's title to the real estate. Upon this showing, and under all the circumstances of the case, it seems clear that Porter should be afforded an opportunity to defend, and that appellee should not be allowed to defeat such defence by a confession of error. And, under all the circumstances of the case, this court has ample authority to direct and order, that the confession of errors by appellee shall be disregarded and rejected, and that Porter shall be allowed to defend in appellee's name.

It is accordingly so ordered, and thirty days are given Porter within which to file a brief.

Filed Jan. 23, 1886.

Alexander *et al.* v. Swackhamer.

No. 11,978.

ALEXANDER ET AL. v. SWACKHAMER.

CONVERSION.—*Innocent Purchaser of Personal Property from Fraudulent Possessor.*—*Liability to Owner.*—Where one falsely and fraudulently represents himself to the owner of personal property to be a member of a responsible firm of commission men, and by a forged check of such firm in pretended payment obtains from the owner, who believes he is dealing with such firm, the possession of the property, and the same is shipped by the impostor to such firm, and by them sold for him in good faith to an innocent dealer, who in turn disposes of it on his own account, the latter, in the absence of negligence on the part of the owner, is liable to him for the value of such property as for a conversion.

SAME.—*Sale.*—*Delivery.*—*Title.*—*Apparent Authority to Sell.*—Under such circumstances there is no sale to the impostor and no title passes, and a delivery by the owner under the erroneous supposition that a sale has been made, neither invests the person to whom the delivery is made with title, nor with an apparent authority to sell the property.

From the Marion Superior Court.

F. Winter and *J. A. Holman*, for appellants.

J. E. McDonald, *J. M. Butler* and *A. L. Mason*, for appellee.

MITCHELL, J.—There is no dispute concerning the facts which gave rise to this suit. The question is upon which of two innocent persons the law will cast the loss occasioned by the operations of one who, by the successful execution of a fraudulent scheme, obtained wrongful possession of property, which was afterwards sold by commission men, to whom it was delivered for sale by the person who was fraudulently in possession of it.

On the 12th day of November, 1883, Swackhamer, a farmer residing in Clinton county, in this State, was the owner of forty head of cattle. A man, calling himself Johnson, and representing that he was a member of the firm of Fort, Johnson & Co., who were general commission salesmen of live-stock at Indianapolis, called at Swackhamer's farm and proposed to purchase his cattle for the firm of

105	81
136	152
105	81
144	68
105	81
165	258

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which he represented himself to be a member. After looking at the cattle, and agreeing on the price, the owner of the animals was informed by the pretended Johnson that he carried no money with him, and that he would be obliged to deliver the check of his firm on their bankers at Indianapolis, in payment for the cattle. This arrangement was not at once entirely satisfactory to the seller. After some suggestions as to the manner in which he might assure himself of payment, it was agreed that Swackhamer should telegraph the banking house of S. A. Fletcher & Co., at Indianapolis, to ascertain the responsibility of the firm of Fort, Johnson & Co., and that the cattle should remain his property until paid for. The pretended Johnson remained over night with the farmer, who in the meantime dispatched an inquiry to the bankers referred to, concerning the standing and credit of Fort, Johnson & Co. Receiving a satisfactory answer he accepted a check, signed Fort, Johnson & Co., for the agreed value of the cattle, and turned them over to the purchaser, who said: "If this check is not promptly paid, these cattle are yours until you get your money." The cattle were driven to a railway station near by, and in the presence of Swackhamer a bill of lading was delivered to Johnson, billing the cattle to Fort, Johnson & Co., in care of J. Zeigler. The cattle were shipped directly to Indianapolis, and were received at the stock-yards by the consignees. Swackhamer placed the check in the Farmers Bank at Frankfort for collection. Two days afterwards he was informed it was a forgery and had been returned unpaid. In the meantime the pretended Johnson had presented himself to Fort, Johnson & Co., under the assumed name of John Zeigler, and had procured them to sell the cattle on commission to the appellants, Alexander & Co. These gentlemen were cattle dealers, engaged in buying stock for eastern markets. They paid full value for the cattle, without notice of Swackhamer's claim, and believed Fort, Johnson & Co. were authorized to sell them as commission men. The cattle were immediately shipped east and

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sold by Alexander & Co. Both Fort, Johnson & Co. and the appellants acted in entire good faith, and their relation to the whole transaction was according to the usual course of business. It turned out that the real name of the alleged Johnson was Kennedy, that he had no relation to or connection whatever with Fort, Johnson & Co., who had never seen him but once before, when he came into their office and inquired about the price of cattle, and remarked that he had a lot to dispose of in the country.

Swackhamer brought this suit against Alexander & Co. to recover the value of the cattle as having been converted by them. The plaintiff had a verdict for \$1,845, for which sum a judgment was rendered after a motion for a new trial was overruled.

The questions presented for decision arise upon instructions given by the court, and upon an instruction prayed by the defendant and refused.

The court instructed the jury, in substance, that if Swackhamer at the time of the transaction was, by the fraudulent practices employed by the person with whom he dealt, induced to believe that he was contracting with Fort, Johnson & Co., through one of the members of that firm, and that he was selling and delivering his cattle to that firm, when in truth he was not dealing with the firm, or with a person authorized to deal on its behalf, then the contract was wholly void, and the title and ownership of the cattle did not pass, even though the cattle were delivered into the possession of the person who falsely personated a member of the firm, and that, under such circumstances, the defendants, although purchasers in good faith, took no title to the property, and would be liable to the plaintiff.

The court further instructed the jury, substantially, that if the sale was made under the false representation that the person to whom it was made was a member of the firm of Fort, Johnson & Co., and that he made the purchase for them upon condition that the title to the cattle was to remain in the

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plaintiff until the check delivered to him in payment was paid, then, even though the cattle were delivered to the supposed member of the firm, the title and ownership remained in the plaintiff, and the defendants, although purchasers in good faith, without knowledge of the condition, would be liable for the value of the cattle.

The defendant asked the court to instruct, in substance, that if Fort, Johnson & Co. were known by the defendants to be commission men, at the time they purchased the cattle from them, engaged in the sale of live-stock, and had the actual possession of the cattle in controversy, and assumed to sell them as commission men, then it was not necessary, in order to defeat the plaintiff's right, that he should have authorized Fort, Johnson & Co. to sell the cattle, or that he should have delivered them into the possession of that firm with the intention that they should sell them, but if he delivered the cattle to a person with knowledge that such person intended to consign them to Fort, Johnson & Co., and with knowledge that Fort, Johnson & Co. were commission men, engaged in the sale of cattle consigned to them, expecting at the time that he permitted them to be taken and consigned, that they would be sold by Fort, Johnson & Co., in the ordinary course of their business, and that they were so sold, then he must be deemed to have conferred such apparent authority upon the commission men to sell the cattle, as authorized them to pass the title to purchasers in good faith, even though the sale was upon the condition that the ownership should remain in the plaintiff until the cattle were paid for.

As relevant to the instructions given by the court, it may be said concerning the one first above summarized, it proceeds upon the theory that in every contract of sale an essential requisite to its validity is that there shall be two contracting parties.

The possession of property may be obtained from the owner by means of fraudulent devices, but it does not necessarily

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follow that the person to whom property is delivered in pursuance of such devices, thereby becomes a purchaser, or that a sale, even though one was intended, has resulted from the transaction. If there was in fact no purchaser, there was no *de facto* sale. No contract resulted which required avoidance. The transaction was void.

Whenever property is obtained from the owner by fraud, it is therefore important to determine whether the facts show a sale to the party guilty of the fraud or a mere delivery of it into his possession as a result of the fraudulent devices practiced.

If the owner of goods is induced by fraudulent representations to deliver them to an irresponsible purchaser, in pursuance of a contract of sale to him, and such purchaser, while in possession, transfers them for a valuable consideration to a third person, who acts in good faith, without notice of the fraud, the title of the good-faith purchaser will prevail over that of the first owner. *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *Parrish v. Thurston*, 87 Ind. 437.

In the case before us, both upon the facts assumed in the instruction, and as they appear in the evidence, there was no contract of sale to the spurious representative of the firm, one of whose members he falsely personated. He did not propose to buy on his own account, nor did the plaintiff contemplate a sale to him.

The plaintiff contracted upon the supposition that he was selling to Fort, Johnson & Co., through the agency of a member of that firm. He did not agree to sell, or contemplate a sale, to any other person, nor did the person with whom he negotiated propose to purchase for himself or any other than Fort, Johnson & Co. The transaction resulted in a misadventure. No sale was made to Fort, Johnson & Co., and as no other was proposed or contemplated, none was made. In the language of the instruction given, the contract was *wholly void*. By means of a trick, the naked possession of his property had been procured from the plaintiff, while

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the title and ownership remained in him, after the delivery the same as before.

No one can transfer a greater right or better title to property than he possesses himself. It follows necessarily, when Fort, Johnson & Co. sold the cattle to Alexander & Co., at the request and for the benefit of the fraudulent possessor, they sold no better or greater right than he had. When, therefore, Alexander & Co. sold the cattle, they sold property to which the plaintiff had a perfect title, and when they received the proceeds of such sale they received money which belonged to the plaintiff. This amounted to a conversion of the plaintiff's property, for which they were liable. *Hamet v. Letcher*, 37 Ohio St. 356 (41 Am. R. 519); *Barker v. Dinsmore*, 72 Pa. St. 427 (13 Am. R. 697); *Moody v. Blake*, 117 Mass. 23 (19 Am. R. 394); *Cundy v. Lindsay*, L. R. 3 App. Cas. 459.

In *McCombie v. Davies*, 6 East, 538, Lord ELLENBOROUGH said: "According to Lord HOLT, in *Baldwin v. Cole*, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods, is a conversion; and certainly a man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it." So, in *Hyde v. Noble*, 13 N. H. 494, it was held that one who claimed a right to property under a purchase from a person who had no title or power to sell, was liable for a conversion.

The cattle were the property of the plaintiff, and their appropriation by Alexander & Co. was without authority. The unauthorized appropriation of another's property is, as a rule, sufficient to enable the owner to maintain an action for its conversion. A purchaser without notice from one who has no title and no right or apparent authority to transfer the property, will not be a defence.

In *Hills v. Snell*, 104 Mass. 173 (6 Am. R. 216), it was said: "Even an auctioneer or broker, who sells property for one who has no title, and pays over to his principal the pro-

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ceeds, with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner." *Shearer v. Evans*, 89 Ind. 400; *Breckenridge v. McAfee*, 54 Ind. 141; *Curme, Dunn & Co. v. Rauh*, *supra*; *Stanley v. Gaylord*, 1 Cush. 537; *Gilmore v. Newton*, 9 Allen, 171; *Grunson v. State*, 89 Ind. 533 (46 Am. R. 178).

As upon the facts assumed there was no sale either absolute or conditional, so much of the second instruction given by the court as referred to a conditional sale was probably not entirely accurate.

The jury were correctly told in the first instruction referred to, that if certain facts and representations were proved, the pretended sale was wholly void. In the second, the same facts, substantially, were assumed, and to the facts assumed was added the further proposition, that if the sale was upon condition that the title to the property should remain in the plaintiff until the check spoken of was paid, then the sale was conditional, and the plaintiff would be entitled to recover. There was no dispute about the material facts in the case, and as upon the undisputed facts there was no sale of any kind, the proposition relating to a conditional sale was wholly immaterial. The court should have so treated it, as well in the instructions given of its own motion as in those refused upon the request of the defendants. If, however, the instruction given was erroneous, it was because, on all the facts assumed in it, the law was stated more favorable to the defendants than the rule warrants. If all the facts recited were proved, there was no sale of any kind, and the defendants were liable.

This practically disposes of the instruction prayed by the defendants. The difficulty with the instruction is, that it is not predicated upon a state of facts upon which a sale of any kind can be founded, or upon which any apparent title, right or authority of the person who obtained the cattle by fraud can be based. It proceeds upon the theory that the bare delivery of the cattle, under the expectation that they were to

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be shipped to a firm engaged in selling cattle on commission, would be sufficient to defeat plaintiff's right. We can not give our assent to this proposition, as applied to the facts in this case.

The fact that possession of the plaintiff's property was obtained by the fraudulent practices alluded to, and under circumstances which neither divested nor in any manner affected his title, could invest the wrong-doer with no such apparent authority as to enable him by any means to communicate any right or title to another; and this would be so even though the plaintiff at the time he delivered the cattle supposed he had sold them to Fort, Johnson & Co., to be resold by them as commission men or factors.

Alexander & Co. can only protect themselves by showing some title, right or authority, real or apparent, in the fraudulent possessor of the cattle. In brief, the instruction asked, as applied to the undisputed facts, proposes, that if possession of the plaintiff's cattle was obtained from him by a person who by means of false devices induced, in plaintiff's mind, the belief that he was selling and delivering them to a responsible firm of commission men, to be resold, when in fact he was not selling them to any one, then the person so obtaining possession had apparent authority to deliver them to the commission men, in such manner that they could transfer the title to Alexander & Co., so as to shield them from liability. The only case brought to our notice which seems to lend any support to this view is *Roach v. Turk*, 9 Heisk. 708. The facts in that case were that Turk sent three bales of cotton to Commerce Landing, on the Mississippi, to be shipped to Roach & Co., commission merchants at Memphis. Ware, a clerk of the shipping agent at the landing, received the cotton in the absence of his principal, and, instead of shipping it in the name of Turk, shipped it in his own name. The commission merchants, without notice of the real owner, sold the cotton and paid the money over to Ware. It was held,

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overruling an earlier case, that the commission men were not liable to Turk, as for a conversion, without a demand for the cotton or its proceeds while it was in their hands.

Upon an examination of the case, it will be found that the non-liability of the commission men was predicated upon the fact that they neither had the property, nor the proceeds arising from its sale, in their hands at the time it was demanded of them. Without yielding our assent to the doctrine of the case cited, which we think is opposed by the authorities we have already cited and many others, we think it clearly distinguishable from the case before us. The cattle in question were the plaintiff's property when Alexander & Co. received and sold them. The proceeds of the sale remained in their hands when the suit was commenced, and they asserted a right to it adverse to the plaintiff. This, on the doctrine of *Roach v. Turk, supra*, made them liable, as for a conversion.

If, upon the facts assumed in the instruction asked by the defendants in this case, it had appeared that a conditional sale had actually been made, an entirely different question would have been presented. In such a case, it might well be, although we decide nothing on the subject, that the purchaser on condition would be clothed with such apparent authority as that the severe rule of law applicable here would not be applied. Possibly, the remedy of the vendor who confers upon another an apparent title by a conditional sale, may be restricted to the right to recover the property, and that no one can be held responsible in tort for its conversion who merely "exercises such dominion over it, as is warranted by the authority thus given." *Hills v. Snell*, 104 Mass. 173; *Burbank v. Crooker*, 7 Gray, 158; *Vincent v. Cornell*, 13 Pick. 294.

As there is no error found in the record the judgment is affirmed, with costs.

ELLIOTT, J., did not participate in the decision of this case.

Filed Jan. 22, 1886.

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ON PETITION FOR A REHEARING.

MITCHELL, J.—It is contended in support of the petition for a rehearing, that, by delivering his property to the impostor under the circumstances disclosed, the appellee is estopped to assert, as against a good faith purchaser, that he had not, by such delivery, invested the impostor with apparent authority to sell the property. It is said the question is not whether the title passed by the transaction between the appellee and the swindler, but whether such an appearance of authority was created by delivering the cattle into his possession, with knowledge that they were to be shipped to a firm engaged in selling on commission, as that the appellee may not now assert anything to the contrary.

In the consideration of this question at the former hearing, our opinion was adverse to the view of the appellants in this regard. We held that as one of the essential factors to a contract—one of the contracting parties—was entirely wanting, no contract resulted, and hence no title passed, and that a delivery under the erroneous supposition that a sale had been made, neither invested the person to whom the delivery was made with title, nor with an apparent authority to sell or dispose of the property thus delivered. We adhere to this conclusion.

Our attention is called to the case of *Samuel v. Cheney*, 135 Mass. 278 (46 Am. R. 467). Upon an examination of the case we do not think it supports the appellants' contention. The origin of that case was a suit to hold a common carrier liable for goods delivered to a swindler. An impostor falsely personated a merchant in good credit, and ordered goods to be shipped to himself by the name of the merchant personated, at a given number. The goods were delivered by the carrier according to the directions upon them, to the person who actually sent the order. The consignor supposed the order was from the merchant. The merchant neither gave the order nor received the goods, but the carrier delivered

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the goods at the place to which they were directed and to the person who actually ordered them. It was held that the contract of the carrier was, not that he would ascertain who was the owner of the goods and deliver to him, but that it was sufficient to exonerate the carrier from liability for negligence if he delivered the goods according to directions to the person to whom they were sent. That the consignor directed and sent the goods to a person different from the one he actually intended, could not make the carrier liable for negligence in delivering the goods at the place to which they were directed and to the very person who ordered them. No question of title or apparent authority was involved in the case. The sole question related to the carrier's negligence.

The appellee was not estopped on the ground of negligence in delivering the cattle under the circumstances disclosed. To constitute an estoppel the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defence which he proposes to set up, and another must have acted on such admission with his knowledge and consent.

The owner of the cattle was induced to believe that he had made a sale to Fort, Johnson & Co. Acting on that belief, he delivered the property, as he supposed, to a member of the firm. For want of a purchaser no contract of sale resulted. No authority or appearance of authority was either conferred or attempted to be conferred upon the impostor other or different from that which would have attended a sale. When it resulted that no sale took place, the delivery and all the incidents of the transaction were a nullity and ineffectual to support the claim of the purchaser. It was void *ab initio*. Unless negligence resulting in injury to another could be imputed to the owner of the property after he discovered, or might have discovered, the deceit practiced upon him, he had the right to treat the property as his own, and recover as for a conversion.

Upon the subject generally, see *Edmunds v. Merchants, etc.*,

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Co., 135 Mass. 283; *Thacher v. Moors*, 134 Mass. 156; *Rodliff v. Dallinger*, 1 New Eng. Rep. 508; S. C., 4 N. E. Rep. 805.

The petition for a rehearing is overruled.

Filed April 1, 1886.

No. 12,265.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY v. DOANE.

MOTION FOR NEW TRIAL.—*Judgment.*—*Practice.*—A motion for a new trial is not a collateral motion, but one directly connected with the judgment, and so long as it remains undisposed of, there can be no final judgment within the meaning of the statute regulating appeals.

SAME.—*Appeal to Supreme Court.*—Where a motion for a new trial was filed on the same day the judgment was rendered, and was not disposed of for six months or more, there was no final judgment from which to appeal until the ruling on the motion.

From the Kosciusko Circuit Court.

J. S. Frazer, W. D. Frazer and J. B. Cohrs, for appellant.
J. W. Cook and J. D. Widaman, for appellee.

ELLIOTT, J.—The verdict in this case was returned on the 4th day of July, 1884, and on the following day judgment was entered upon it. On the same day that the judgment was entered the appellant filed a motion for a new trial; the cause was then continued until the 23d day of December, 1884, without any action being taken; on that day the appellee unsuccessfully moved to strike out some of the reasons assigned in the appellant's motion for a new trial, and on the 23d day of January, 1885, the appellant's motion was overruled and an appeal prayed.

There was no final judgment within the meaning of the statute governing appeals until the ruling denying the motion for a new trial. The appellant had a right to a ruling on that motion; for it was properly and seasonably filed. Until that

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motion was disposed of, there was no final disposition of the case. It is quite clear that if the appellant had brought up the case before a ruling on the motion, the appeal would have been dismissed, on the ground that it was prematurely taken.

A motion for a new trial is not a collateral one, but is one directly connected with the judgment, and is essential to present for review errors occurring on the trial, and so long as it remains undisposed of there can be no final judgment within the meaning of the statute regulating appeals. A pending motion for a new trial keeps the cause in the trial court, provided, of course, that the motion was seasonably filed.

Motion to dismiss appeal overruled.

Filed Jan. 22, 1886.

No. 11,831.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. BALCH.

VERDICT.—*Special and General.*—*Judgment.*—*Practice.*—Where, under the statute, a party demands a special verdict, he is entitled to a special finding of all the facts proved in the case, and to the judgment of the court upon those facts.

SAME.—*When General Verdict Must be Disregarded.*—If, upon a demand being made for a special verdict, both a special and a general verdict are returned by the jury, the general verdict must be disregarded.

CONVERSION.—*Question of Law and Fact.*—*Special Verdict.*—*Practice.*—The question of a wrongful conversion of property is generally a mixed question of law and fact, and when a special verdict is to be returned the jury find the facts and the court applies the law.

SAME.—*Failure of Jury to Find Material Facts.*—*Venire de Novo.*—*Railroad.*—Where the jury, in a special verdict, find that the defendant, a railroad company, "took and converted the property in controversy to its own use," but do not set out the facts upon which such conclusion is based, the court should send them to their room to perfect their verdict, or if this be not done, a *venire de novo* should be granted.

106	83
124	279
124	451
106	93
122	415
122	417
106	93
122	226
106	93
125	451
105	93
139	64
105	93
145	108
145	111
106	93
151	386

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SAME.—*Sufficiency of Complaint Alleging Conversion.*—A complaint against a railroad company, alleging that the defendant unlawfully and wrongfully took, converted and appropriated the property in controversy to its own use by hauling it away and using it in its road, sufficiently charges a conversion.

SAME.—*Location of Property.—Motion to Make Specific.—Practice.*—Where, by reason of the loss of his memorandum, the plaintiff alleges that he is unable to locate the property any more definitely than that it was along the line of the defendant's road in certain counties, it is not a reversible error to overrule a motion to make the complaint more specific.

From the Clinton Circuit Court.

G. W. Easley, W. F. Stillwell, S. O. Bayless and W. H. Russell, for appellant.

J. V. Kent, J. W. Merritt and O. E. Brumbaugh, for appellee.

ZOLLARS, J.—Appellee brought this action to recover the value of a large amount of bridge timber, piling timber and railroad cross-ties, which he alleges appellant took and converted to its own use.

It is averred in the complaint that appellee was the owner of such timber and ties, located along the line of appellant's road in the counties of Carroll, Clinton, Boone, Hamilton and Marion, and that he was unable to give a more particular description of the exact location, because of the loss of a memorandum. A motion to make the complaint more certain as to the location of the property was overruled, and appellant excepted. Error is predicated upon this ruling.

We do not think that it was such an error as would justify a reversal of the judgment. If appellant took and converted the property as charged, it might have been impossible for appellee to discover its exact location when so taken, in the absence of a memorandum which he seems to have had and lost.

Under the assigned error in overruling a demurrer to the complaint, appellant's counsel argue that it does not sufficiently charge a conversion of the property by appellant.

We think otherwise. It is charged that appellant unlaw-

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fully and wrongfully took, converted and appropriated to its own use all of the property, by hauling it away, and by putting it into the construction of repairs and other uses of the railroad, and by refusing to allow appellee to remove or use his said property. These averments clearly constitute a charge of conversion, and hence the demurrer to the complaint was properly overruled. *Gordon v. Stockdale*, 89 Ind. 240, and cases there cited. See, also, *Robinson v. Skipworth*, 23 Ind. 311; *Proctor v. Cole*, 66 Ind. 576; *Terrell v. Butterfield*, 92 Ind. 1; *Nelson v. Corwin*, 59 Ind. 489; *Nichols v. Newsom*, 2 Murphey (N. C.), 302; *Badger v. Hatch*, 71 Maine, 562; *Spencer v. Blackman*, 9 Wend. 167; *Ferguson v. Clifford*, 37 N. H. 86; *Laverty v. Snethen*, 68 N. Y. 522 (23 Am. R. 184); *Syeds v. Hay*, 4 T. R. 260; *Bristol v. Burt*, 7 Johns. 254.

Before the argument, appellant, by its counsel, requested that the jury should be required to find and return a special verdict.

The jury returned a general verdict in favor of appellee, assessing his damages at \$4,520, and also a special verdict. In the body of this special verdict is also injected a general verdict in favor of appellee. When these verdicts were returned by the jury, appellant objected to the reception of the general verdict, and subsequently moved to strike it out. Appellant also objected to the discharge of the jury until they should render a more perfect special verdict. These objections and motion were overruled, and appellant excepted. Thereupon appellant moved for a *venire de novo*, on the ground that the special verdict is not a finding of the material facts in the case, but embodies conclusions of law.

We think that the court clearly erred in refusing to require the jury to perfect their special verdict, and in overruling appellant's motion for a *venire de novo*. Appellee's counsel seem to have tried the case upon the theory that the jury had the right to return both a general and special verdict, even though a special verdict was demanded. The court also seems to have proceeded upon the same theory, and hence charged the jury

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at length as to the law of the case. In these charges, the jury were instructed at length as to what acts by appellant would amount to a conversion of the property. These instructions, doubtless, influenced the jury in arriving at their general verdict, and in reaching the general conclusion in the special verdict, that appellant had converted the property to its own use.

Verdicts are thus defined by the statute: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving judgment thereon to the court." R. S. 1881, section 545.

It is further provided in section 546 that, "In all actions, the jury, unless otherwise directed by the court, may, in their discretion, render a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing. This special finding is to be recorded with the verdict."

These sections of the statute clearly provide for two kinds of verdicts, a special and general verdict. They do not together form one verdict, but are separate and distinct. A general verdict is a finding generally for the plaintiff or defendant upon the facts and the law as given by the court in instructions. A special verdict is a finding of the facts only. In this, the jury have nothing to do with the law. The court does not instruct them as to the law, but in the rendition of the judgment, applies the law to the facts found by the jury. *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

There is a marked distinction between a special verdict and interrogatories propounded to the jury. These are allowed only in case a general verdict is found, and are allowed for the purpose of discovering whether or not the jury have

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rested their verdict upon sufficient, material and consistent facts. They may be propounded in reference to one or more of the material facts in the case. Such interrogatories can not accompany a special verdict, because the special verdict is itself the finding of the facts. It is perfectly consistent to allow interrogatories to accompany a general verdict, for the reasons stated, but it would not be consistent to allow both a general and special verdict in the same case, for the reason that one finds both the law and the facts of the case, while the other finds the facts only, leaving the law for the court in the rendition of the judgment. Each is a mode different from the other, in reaching the final conclusion in the case, and settling the ultimate rights of the parties.

The jury, unless otherwise directed, may find either a general or special verdict, but if, upon the request of either party, they are required to find a special verdict, they should not return a general verdict also. These views are fully sustained by the well considered case of *Todd v. Fenton*, 66 Ind. 25.

It was suggested in the case of *Graham v. State, ex rel.*, 66 Ind. 386, that under section 546 of the statutes, *supra*, the court might direct the jury to find the facts specially which might be proved in relation to some of the issues, and to find a general verdict upon the others. However that may be, such a special finding would not be the special verdict mentioned in section 545 of the statutes, nor such a special verdict as a party has the right to demand, and as was demanded in the case before us. When a party demands a special verdict generally, he is entitled to a special finding of all the facts proven in the case, and to the judgment of the court upon those facts. When such a verdict is demanded, there is no place for a general verdict in the same case. If, in such a case, both are returned by the jury, one or the other must be disregarded, because they are inconsistent modes of reaching the final determination of the controversy between the par-

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ties. In the case in hearing, a special verdict was demanded by appellant. That demand neither the court nor the jury could disregard. A special verdict was returned, and being the verdict demanded, it was the verdict, and the only verdict, that could be considered in the rendition of the final judgment. The general verdict returned with it had no office to perform, and should have been disregarded by the court below, as it must be by this court. Being thus disregarded, it will not affect the rights of the parties in any way; and if thus disregarded, the overruling of appellant's motion to strike it out is rendered harmless.

In support of appellee's contention that the jury may return both a general and special verdict, we are cited to the cases of *Hershman v. Hershman*, 63 Ind. 451, and *Webster v. Bebinger*, 70 Ind. 9.

In the case of *Hershman v. Hershman*, *supra*, the jury returned a general verdict, and, also, what they denominated a special verdict in addition to the general verdict. In that case, the question does not seem to have been made as to whether or not the jury could render both a general and special verdict. Nor had there been a demand for a special verdict, as in the case before us. The case was disposed of upon the theory that the general verdict was the verdict in the case, and should be upheld unless overthrown by the special finding of facts. The so-called special verdict was not treated as a separate verdict, but as a part of the general verdict, and made to perform the office of answers to interrogatories in sustaining or overthrowing the general verdict. But if the case should be regarded as authority in support of the proposition, that with a general verdict, and as a part of it, the jury may return a special verdict finding the facts, it could not be regarded as authority in support of the proposition, that when directed to find and return a special verdict, the jury may also return a general verdict, either as a part or independent of the special verdict.

The purpose of a special verdict is to avoid the mistakes

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that the jury may make in the application of the law to the facts, and hence a demand for a special verdict is a demand that there shall be no general verdict. If, over these demands, a general verdict may be returned with the special verdict, and be given effect, the purpose of the special verdict is thwarted, and the statute authorizing it is rendered nugatory.

In the case of *Webster v. Bebinger*, *supra*, it is said that there was a general and special verdict for the defendant. What the special verdict was, is not stated in specific terms, nor is it shown that a special verdict had been demanded. No question seems to have been made as to whether or not the jury may return both a general and special verdict, nor was that question decided. The following is the whole of the opinion upon the question: "No error was committed in refusing to strike out the general verdict, if the special verdict is sufficient; and, if the special verdict is sufficient, it was not error to refuse to grant a *venire de novo*." That case, we think, can not be regarded as authority in support of appellee's contention.

Sustaining appellant's right to a special verdict, and disregarding the general verdict returned by the jury, we pass to a consideration of the special verdict. The whole of it in relation to the alleged conversion of the property by appellant, is as follows: "We further find that the Louisville, New Albany and Chicago Railway Company took and converted all of said property to her own use, and that said property at that time was of the value of four thousand five hundred and twenty dollars." Appellant's contention that this portion of the verdict is not a statement of facts, but a statement of a conclusion of law, can not be disregarded.

The question of a wrongful conversion of property, like the question of negligence, is generally a mixed question of law and fact. The facts must be found by the jury, when the trial is by jury, and the law is for the court. When a general verdict is to be returned, the jury take the facts from

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the witnesses, and the law from the court in the way of instructions. When a special verdict is to be returned, the jury find the facts, and the court, in pronouncing judgment, applies the law to the facts, and decides whether or not the facts found constitute a wrongful conversion. One person may take and remove the property of another without being guilty of a wrongful conversion of the property. Such taking and removal may be by the consent, express or implied, of the owner, or it may be done through an honest mistake. In neither of these cases would the taking and removal amount to a wrongful conversion of the property. So far as shown by the finding of any fact in the special verdict, appellant was guilty of no wrong in connection with the property. It is found that it took the property, but there is no fact found that makes that taking wrongful.

The finding, that appellant converted the property to its own use, is a conclusion of law, resting upon facts which are not shown in the verdict. Were these facts shown, they might, or they might not, constitute a wrongful conversion by appellant.

The jury should have found the facts, and left it for the court to say whether or not, as a matter of law, they constitute a wrongful conversion of the property. The jury had no right to embody in their special verdict the conclusion of law, and such conclusion must, therefore, be disregarded and rejected, as forming no part of the verdict.

If the special verdict, aside from the conclusion of law, contained sufficient facts to lead to and support a judgment, it might be upheld, but it does not. It is apparent that the jury attempted to state sufficient to make appellant liable, but failed to do so, by stating a conclusion of law instead of facts. The court, therefore, should have sent the jury to their room to perfect their verdict, and having failed to do that, should have sustained the motion for a *venire de novo*. See *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and cases

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there cited; *Indianapolis, etc., R. W. Co. v. Bush, supra; Knox v. Trafaleit*, 94 Ind. 346.

The errors of the court in overruling appellant's motions in relation to the special verdict are not technical errors that this court may disregard. The law gave to appellant the right to demand a special verdict. It had the right to demand that that verdict should be such as that the court could declare the law and pronounce judgment upon it.

Other questions are discussed by counsel, but as they may not arise upon another trial we decide nothing in relation to them.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to sustain appellant's motion for a *venire de novo*.

Filed Jan. 19, 1886.

No. 10,801.

RYAN ET AL. v. RAY ET AL.

SAVINGS BANK.—*Action to Wind up Affairs of Must be Brought by State Auditor.*—Under section 2757, R. S. 1881, the auditor of state is the only person authorized to maintain an action against the officers and trustees of savings banks for a violation of their statutory duties.

SAME.—*Creditors Must Look to Auditor's Proceeding.*—Where the auditor of state has brought an action to wind up the affairs of a savings bank, all persons whose rights are involved must look to that officer and that proceeding for their enforcement. They can not maintain an independent action for that purpose.

From the Marion Superior Court.

A. C. Harris, W. H. Calkins, C. F. Rooker and A. W. Hatch, for appellants.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, R. B. Duncan, C. W. Smith, J. S. Duncan and J. R. Wilson, for appellees.

105	101
146	626
105	101
1153	104

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MITCHELL, J.—This action was brought by Mattie J. Ryan, Emma Keller and Margaret Thornton, who aver in their complaint that they sue for themselves and two thousand other depositors in the Indianapolis Savings Bank.

The suit is against the officers and trustees of the savings bank. The auditor of state and the bank are also named as defendants in the complaint. The action is to charge the officers and trustees, and make them personally liable for alleged misconduct and violation of duty in the conduct of the bank.

It is averred that the bank was organized and opened for business about the 28th day of September, 1871, and that it continued to do business until the 20th day of December, 1878. That at the last mentioned date it was found to be insolvent, and that the auditor of state instituted proceedings in the Marion Superior Court to wind up its affairs. That a receiver was appointed who was administering its assets when this action was commenced.

It is averred that the officers and trustees had, in various ways, neglected their duty, and mismanaged the business of the bank.

Numerous specifications of misconduct, deception and negligence are set out in the complaint, and it is averred that by means of the several acts specified the assets of the bank were wasted and diminished in a large amount, to the damage of depositors, and of the plaintiffs particularly.

It is alleged that the defendants were the officers in control of the bank, and that they would not permit the action against themselves to be brought by and in the name of the bank; that the action which was brought by the auditor of state was brought at the request of the officers and trustees of the bank, the complaint in that case alleging the insolvency of the bank, but charging no fraud or neglect on the part of the trustees, nor any loss, arising out of any dereliction of duty or violation of trust on the part of any of the officers or trustees of the bank, and claiming no damages

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against any of the trustees for dereliction of duty or violation of trust; that the complaint in that action prayed for the appointment of a receiver, and that the assets might be converted into cash, and that the bank might be wound up; that the trustees themselves appeared to the action on the same day the complaint was filed, confessed the insolvency of the bank, and consented to the appointment of a receiver, and that thereupon the defendant, John W. Ray, the former secretary and treasurer of the bank, was appointed receiver; that from the condition of the pleadings in that cause the auditor of state will not and can not attempt to recover for the losses caused by the trustees, nor in any manner protect the depositors from such losses. But that on the contrary the auditor of state maintains the former action, which is yet pending, for the purpose of enabling the defendants, bank officers and trustees, to screen themselves and their several acts of omission and commission from investigation and scrutiny.

The prayer of the complaint in the cause now before us is, that the plaintiffs, on behalf of themselves and other depositors for whose benefit they sue, may be permitted to maintain this action, the same (so it is alleged) not being intended in any way to interfere with any of the matters or proceedings involved, or which could be presented, heard or adjudicated upon, in the action theretofore begun by the auditor of state, and that the plaintiffs may have judgment for an accounting and may recover against the trustees the sum of two hundred and sixty thousand dollars, to be distributed among all depositors according to their rights, and that a receiver be appointed by the court.

The trustees and officers demurred to the complaint. The demurrer was sustained at special term, and on appeal to the general term this ruling was affirmed.

The decision of two questions presented by the record and argument is all that is necessary to determine whether the rulings of the Superior Court were correct. These questions are aptly stated as follows:

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1. Can any person other than the auditor of state, under any circumstances, maintain an action against officers and trustees of savings banks for a violation of their statutory duties?

2. If, under any circumstances, the plaintiffs might maintain the present action, can they maintain it, when, as the record shows, the auditor of state has now pending an action against the trustees of the bank in another court, and when such other court has a receiver in charge of the assets of the bank?

An examination of the statute under which savings banks may be organized, gives rise to the suggestion at once that it was the purpose of the Legislature to embrace in its provisions a complete and adequate scheme for the organization, regulation and winding up of all institutions which might come into existence under it. Accordingly the qualifications and duties of trustees are prescribed with much minuteness, and the general course and conduct of the business is marked out with particularity and in unusual detail.

From the beginning of their existence until they are closed and their assets distributed, they are subject in many respects to the control and scrutiny of an officer of the State. Finally, it is provided in section 2757, R. S. 1881, substantially, that, whenever a savings bank fails for thirty days to pay depositors, as required by law, or whenever it shall appear to the auditor of state that the trustees or officers of a bank are mismanaging its affairs, and the same is insolvent, or in imminent danger of insolvency, the auditor shall forthwith file a complaint against such savings bank, and the trustees and officers thereof, asking for the dissolution of the corporation and the winding up of its affairs. "If it shall be established, upon the trial of the cause, that any trustee or other officer has been guilty of any wilful or fraudulent misconduct, whereby the assets of the corporation have been wasted or lost, the court shall render judgment against him to make good all such losses as his misconduct has occasioned; and

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such recovery shall be for the benefit of the depositors and other creditors of such savings bank; and the court, in such proceedings, may render several judgments against the several trustees or officers who have been guilty of such misconduct."

It thus appears that the Legislature, in providing for the organization of savings banks, clearly evinced its purpose to put them and their officers and trustees under the supervision and control of the State. This it was entirely competent for it to do. By this statute it became the duty of the auditor of state, whenever it was made to appear to his satisfaction that the officers of the bank were mismanaging its affairs, or that it had become or was in danger of becoming insolvent, to institute suit to wind it up, and to enforce against its officers any liability which they may have incurred by reason of any wilful or fraudulent misconduct. The duty of the auditor, and the liability of the officers, and the manner of enforcing such liability, are clearly and explicitly defined.

The officers of savings banks, like officers of other corporations, are only liable to the creditors of the artificial body in the manner and to the extent prescribed by law. The general rule is, unless officers are made liable by statute for neglect of duty and mismanagement in office, creditors must look to the corporation for redress in respect of obligations contracted with it.

Under the statute already referred to, the circumstances under which the officers and trustees are to be held personally accountable, and the manner of enforcing their liability, are prescribed. The Legislature having provided a complete remedy through an officer of the State, who has been given a general supervision over the affairs of savings banks, no reason is apparent why the rule should not apply, that the remedy thus provided is exclusive of all others. It was competent for the Legislature, in providing for the organization of savings banks, to prescribe what remedies should be had

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against them, as well as against those who by law were to be entrusted with the management of their business. *Smith v. Manufacturers' Nat'l Bank*, 9 Nat'l Bank. Reg. 122. Accordingly, it was held in the case above cited, that inasmuch as the act providing for the organization of national banks provided also how and by whom their affairs should be wound up, the method so prescribed was exclusive, and that a petition by a creditor to have such bank adjudged a bankrupt would not be entertained.

The case of *Von Glahn v. DeRosset*, 81 N. C. 467, is analogous in principle. The provision of the revised code of that State, chapter 26, sections 5 and 6, which continues the existence of defunct corporations for three years after the expiration of their charters, for the purpose of bringing and defending suits and closing their general business, ousts the former equity jurisdiction for the appointment of a receiver, at the instance of creditors, to wind up their corporate affairs. It was held in the case above cited, that the statutory remedy was exclusive of all others, and that a creditor could not maintain an action in his own behalf and in behalf of others. See, also, *Crisp v. Bunbury*, 8 Bing. 394.

This last case was an action for money had and received, brought by a depositor against the defendants as trustees of a savings bank. The court there said: "It appears, therefore, to us, that the only law which governed and regulated the rights of the parties to this action at the time the action was brought, is to be derived from the only statute then in existence in relation to the subject-matter of the action." *Chapman v. Milvain*, 5 Welsby H. & G. 61; *Kennedy v. Gibson*, 8 Wall. 498.

The principle which controls is that which has already been stated in substance, viz., that where a new right is created, and a specific mode of relief provided, the remedy is confined to the mode prescribed. *Aldrich v. Hawkins*, 6 Blackf. 125; *Storms v. Stevens*, 104 Ind. 46; *Howard v. Ken-*

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tucky, etc., Mut. Ins. Co., 13 B. Mon. 282; *Jessup v. Carnegie*, 80 N. Y. 441 (36 Am. R. 643).

This principle is illustrated in a great variety of cases. Further elaboration or citation of authority can not be necessary.

We think it clear that the mode of winding up the affairs of savings banks, and enforcing the liability of their trustees and officers for wilful or fraudulent misconduct, is prescribed in section 2757, above referred to, and that mode excludes all others.

It results, therefore, that the auditor of state alone is authorized to maintain an action against officers and trustees of savings banks for a violation of their statutory duties. This rule demands unhesitating application in a case where, as in the complaint before us, it appears that a suit has been brought by the auditor and is now pending to wind up the affairs of the bank.

The suggestions of collusion between the auditor and the trustees and officers of the savings banks go for nothing. It can not be doubted that the court in which the proceeding instituted by that officer is pending, and whose receiver is now administering its assets, would find abundant facilities for investigating the conduct of the trustees and officers of the bank in such manner as to afford a complete vindication of the rights of all concerned. The proper officer of the State having brought the matter of winding up the affairs of the bank within the jurisdiction of the court, all those whose rights are involved must, through that officer and in that proceeding, find the means of enforcing the statutory liability against delinquent officers and trustees, if any are delinquent.

Whether the plaintiffs may intervene there, or whether the discretion lodged in the auditor of state may be controlled, we need not now determine. What we do decide is, that since the statute prescribes that the auditor shall enforce

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against the officers and trustees of savings banks the liability which the plaintiffs are here seeking to enforce, if such liability exists, the auditor alone is entitled to enforce it. The plaintiffs can not by alleging that the auditor has not acted wisely in framing his complaint, or in prosecuting the action which he alone is authorized to prosecute, maintain an independent suit and thus defeat the purpose of the statute. To hold otherwise would expose the officers and trustees of the bank to numberless suits by the several depositors, and at the same time subject them to continued liability at the suit of the auditor.

The policy of the law seems to have been to put the management of savings banks under the protection of the auditor of state, as well as under his surveillance. It is made his duty to demand of them a strict compliance with the statute and to enforce against their officers a vigorous personal liability for misconduct, but, in doing so, it also protects them from answering upon the same account to every depositor who may have sustained real or imaginary injury. Were it otherwise, no one could afford on any account to take the management of a savings bank. The affirmance of the judgment results necessarily from what has been said.

We need not determine whether the suit was well brought by the plaintiffs on behalf of themselves and others, nor is it important that we examine the particular facts complained of with a view of determining the sufficiency of the complaint.

The judgment is affirmed, with costs.

ELLIOTT, J., did not participate in the decision of this case.

Filed Jan. 19, 1886.

House v. Alexander.

No. 12,300.

HOUSE v. ALEXANDER.

INFANT.—*Contract.—Purchase of Personal Property.—Rescission.—Recovery of Money Paid.*—An infant who has purchased an unnecessary article of personal property, may rescind the contract and recover the money paid.

SAME.—*Horse not a Necessary.*—A horse purchased by an infant who is engaged in farming is not a necessary.

SAME.—*Ratification.*—An infant can not be held to have ratified the contract because the property is still retained by him, after he has done all in his power to secure a rescission, and has brought suit for that purpose.

SAME.—*Tender.*—Where a tender is made, and a reason is given for its rejection which shows that a further tender would be fruitless, none other need be made.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

J. D. Miller and *F. E. Gavin*, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's complaint alleges that he is an infant ; that he bought of the defendant a horse for which he paid one hundred and fifty dollars ; that he tendered back the horse to the defendant and demanded the return of his money ; that the purchase of the horse was not for his benefit. Prayer for a rescission of the contract and the recovery of the money paid.

In support of the attack upon this paragraph of the complaint, appellant's counsel quotes from 1 Parsons on Contracts, 322, the following: " If an infant advances money on a voidable contract which he afterwards rescinds, he can not recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." This is not and never was the law. In *Shurtleff v. Millard*, 12 R. I. 272 (34 Am. R. 640), the court expressly repudiated Mr. Parsons' statement, saying: " He cites no authority. The doctrine so broadly laid down has been overruled by later authorities, and this passage has been condemned in *Robinson v. Weeks*, 56

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154	195
105	106
162	522

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Maine, 102, 104; still the last edition of the text-book takes no notice of the fact." 1 Whart. Cont., section 47; *Sparman v. Keim*, 83 N. Y. 245; *Cooper v. Allport*, 10 Daly (N. Y.), 352; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Ind. 210; *Dill v. Bowen*, 54 Ind. 204; *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Ayers v. Burns*, 87 Ind. 245 (44 Am. R. 759).

There is some conflict in the authorities as to whether an infant may avoid a contract and recover the money paid upon it without returning the property received by him, but there is no substantial difference upon the proposition that where he tenders back all that he receives, and seeks a recovery of the money paid by him, he is entitled to recover it. Our cases, beginning as far back at least as *Miles v. Lingerman*, 24 Ind. 385, hold that there may be a recovery although the property received is not restored, but in this instance our decision stops far short of that, for here the contract was not for the infant's benefit, and he offers to restore the property received.

The theory of the third paragraph of the appellant's answer is that the horse bought of him was a necessary, for the reason that the appellee was engaged in farming, and needed the horse in order to successfully carry on his business. This theory is unsound. The law does not encourage persons to engage in business during non-age, but, on the contrary, its policy is to keep infants from engaging in business until they have attained full age, and upon this ground it is uniformly held that articles purchased for business purposes, whether that of agriculture or commerce, can not be deemed necessities. This is the law, as the courts declare, even though the infant depends upon his business for support. *Love v. Griffith*, 1 Scott, 458; *Latt v. Booth*, 3 C. & K. 292; *Mason v. Wright*, 13 Metc. 306; *Merriam v. Cunningham*, 11 Cush. 40; *Decell v. Lewenthal*, 57 Miss. 331; *Grace v. Hale*, 21 Tenn. (2 Humph.) 28; 1 Rol. Abr. 729; Cro. Jac. 494.

Horses are not necessities. The court affirmed this gen-

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eral rule in *Price et al. v. Sanders*, 60 Ind. 310, saying: "But it has been pithily and happily said that necessities do not include horses, saddles, bridles, liquors, pistols, powder, whips and fiddles." A verdict awarding compensation against an infant for the hire of horses and gigs was set aside in *Harrison v. Fane*, 1 M. & G. 556, as perverse.

In *Wharton v. Mackenzie*, 5 Ad. & E. 606, COLERIDGE, J., very strongly declares that horses are not necessities. The case of *Hart v. Prater*, 1 Jurist 623, can not be justly considered as an exception to the general rule, for, although it was there held that a horse was a necessary, it was so because the infant had been directed to use one by his medical adviser, Sir Benjamin Brodie. In such a case as that it may well be that a horse is a necessary in the same sense that medicines and medical services are necessities.

We need not discuss the fourth, fifth and sixth paragraphs of the answer in detail, for what we have said disposes of the legal questions arising upon them.

The seventh paragraph of the answer alleges that the appellee ratified the contract after he became of age, but the facts stated do not sustain the conclusion of the pleader, and it is by the facts and not upon the conclusion that the sufficiency of the answer must be determined. The complaint avers that the appellee had disaffirmed the contract, had offered to restore the property, and had demanded the consideration paid for it, so that a mere retention and use of it after he attained majority can not be deemed a ratification. We think it perfectly clear that after an infant has done all in his power to secure a rescission and has brought suit to rescind the contract, he can not be held to have ratified the contract because the property is still retained by him. What more he could do to evidence his repudiation of the contract, or what more he could legally do towards putting it into the possession of the seller, we are at a loss to conjecture.

No objections to the testimony condemned by a general assertion are pointed out, and well settled rules forbid us from

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searching for them. If counsel expect to have objections considered they must specifically state in their brief what they are.

Sixteen days after the purchase of the horse the appellee took it and started to the appellant's house, but met the latter on the highway some distance from his house. What occurred at that time is thus described by the appellee: "I told Mr. House I had brought the horse back; he was not what I bought him for, nor what he represented him to be; I told him I wanted my money back; he said he would not give it; I got out and held the horse; Mr. House looked at the horse; he was afoot driving hogs; he said he would not take him; he said something about the horse being abused." This evidence shows that the acts of the defendant excused a tender, for it is settled law that where a tender is made and a reason is given for its rejection, which shows that a further tender would be fruitless, none other need be made. *Hanna v. Phelps*, 7 Ind. 21; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362, see p. 368. Conceding, but not deciding, that a tender was necessary, the evidence shows that a sufficient one was made.

Judgment affirmed.

Filed Feb. 12, 1886; petition for a rehearing overruled April 14, 1886.

106	112
127	476
106	112
132	249
106	112
154	113
105	112
157	89

 No. 12,875.

HOLDERMAN v. THOMPSON, SHERIFF.

BASTARDY.—*Jurisdiction.*—*Commitment to Jail.*—*Habeas Corpus.*—*Collateral Attack.*—Where the circuit court, in a bastardy proceeding, having jurisdiction of the subject-matter and of the defendants, commits the latter to jail on a bench warrant for failing to cause the judgment rendered against him in such proceeding to be replevied, such judgment can not be collaterally attacked on *habeas corpus*. Section 1119, R. S. 1881.

SAME.—*Recognizance.*—*Continuance.*—*New Bond.*—*In Custodia Legis.*—*Volun-*

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tary Appearance.—The fact that after the defendant in a bastardy proceeding has been recognized by a justice of the peace to appear in the circuit court, and the case is there continued from term to term without a new bond being required, does not release him from the custody of the law; and the further fact that he voluntarily appeared and was present at the trial, does not affect the jurisdiction of the court over him.

SAME.—Waiver by Relatrix.—The relatrix in a bastardy proceeding can not waive anything which the law requires.

From the Elkhart Circuit Court.

H. C. Dodge, for appellant.

F. T. Hord, Attorney General, *W. B. Hord* and *L. W. Vail*, for appellee.

MITCHELL, J.—The record discloses that in a proceeding under the act regulating prosecutions for bastardy, and making provision for the support of illegitimate children, the appellant was, by the finding and judgment of the Elkhart Circuit Court, adjudged to be the father of an illegitimate child, and ordered to pay to the clerk of the court, subject to its further order, until a suitable guardian should be appointed, the sum of \$400 in yearly instalments of \$50 each. It was further ordered by the court, that the defendant should cause replevin bail to be entered for the stay of execution on the judgment, to the approval of the clerk, or in default thereof to be committed to the county jail.

A motion was made to modify the order, so far as it directed the commitment of the defendant, in default of entering replevin bail. This was overruled.

Failing to comply with the order, a bench warrant was issued and the defendant taken and held in custody by the sheriff. Subsequently the appellant, in a petition presented to the court, alleged that he was unlawfully restrained of his liberty by Charles E. Thompson, the sheriff of Elkhart county, on the bench warrant so issued. The petition recited the proceedings in the bastardy suit in detail, alleging that the appellant had been duly recognized, by the justice

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before whom they were commenced, to appear at an ensuing term of the Elkhart Circuit Court; that the cause had been continued from term to term, from the February to the December term, 1885, and that upon each of the several continuances the giving of a bond had been waived.

It was averred that the petitioner was voluntarily present during the trial of the bastardy case; that he had not absconded, was not under arrest or in custody, and that no bond had been required of him before the order of commitment was made, and that he was unable to pay or replevy the judgment as required by the order of the court. For these reasons the petitioner alleged that his restraint was unlawful and that he ought to be restored to liberty. Accordingly a writ was issued commanding the sheriff to produce the body of the petitioner before the judge and to make return to the writ. In justification, the sheriff, with the body of the petitioner, returned the proceedings, judgment and order of the court in the bastardy suit, the default of the defendant, and the bench warrant, in pursuance of the command of which he took and then held him in custody. To this return, five exceptions were taken:

1. Because it did not negative the allegations in the petition that the petitioner was at no time in custody or under arrest.

2. Because it did not negative the averments in the petition that the plaintiff in the bastardy suit waived the arrest of the petitioner, and waived the giving bond for his appearance, or that he be held in custody.

3. Because it did not negative the averment in the petition that the petitioner voluntarily appeared to the bastardy suit, and because the plaintiff in the bastardy suit agreed to rely on the personal responsibility of the petitioner for the payment of the judgment, and waived a bond and the arrest of the petitioner during the proceedings and until after the judgment.

4. Because the return did not state facts sufficient, etc.

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5. Because it is not stated in the return that the court or judge had power to order the petitioner to be placed in jail in pursuance of the order of the court.

These exceptions were overruled, and the appellant now asks a review of this ruling on appeal.

Concerning *habeas corpus* proceedings, it is provided, section 1119, R. S. 1881: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: * * *

"*Second.* Upon any process issued on any final judgment of a court of competent jurisdiction."

Circuit courts may acquire jurisdiction in the manner provided in bastardy proceedings. It is conceded that under some circumstances an order of commitment may be made in such cases. It follows that unless it affirmatively appears upon the face of the record in the bastardy proceeding, that the Elkhart Circuit Court did not have jurisdiction of the subject-matter, or of the person of the defendant, the order of commitment was not void for want of jurisdiction, and if not thus void, the legality of the judgment or process under which the appellant was committed can not be inquired into in this collateral proceeding.

It is affirmatively shown by both the petition and the return in this record, that the proceedings in the bastardy suit, and the defendant, were regularly before the circuit court at the time the judgment was given. It thus appears that the court had competent jurisdiction under the law to pronounce the very judgment given, and even if it were conceded that it was erroneously given in that particular case, such error could only be corrected on appeal. *Smith v. Hess*, 91 Ind. 424; *Lucas v. Hawkins*, 102 Ind. 64; *Willis v. Bayles*, *post*, p. 363; *Lowery v. Howard*, 103 Ind. 440; *Church Habeas Corpus*, section 267. The order of commitment was, however, not erroneous.

The argument is that because a bond was waived when the

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cause was continued from term to term in the circuit court, and the defendant was not in custody, and had not escaped, but appeared at the trial without compulsion, or voluntarily, the court had no power to make the order in question.

The fallacy of the argument lies in disregarding the distinction between actual custody or personal restraint, and constructive or legal custody.

Assuming that all the facts relied on appeared upon the face of the record in the bastardy proceeding, the order of the court was nevertheless correct.

In contemplation of law a defendant in a bastardy proceeding has either not been arrested, has escaped after arrest, is in actual custody, or under bond for his appearance. If under bond, he is in the custody of his bail, and none the less *in custodia legis*. *Turner v. Wilson*, 49 Ind. 581; *State v. Rowe*, 103 Ind. 118.

It is not necessary that he shall be in actual custody of the sheriff in order that a judgment of committal may be rendered against him.

An examination of the statute will disclose that from the inception of the proceeding until the final order of the court is complied with, the law contemplates that the defendant shall be and remain in the custody of an officer or under bail. This is to the end that any judgment which may finally be rendered against him may be secured, and society protected from the burden of maintaining his spurious offspring. "A person arrested by law, and put in the custody of the law, remains in custody, either actually or potentially, until he is discharged according to law." *Turner v. Wilson*, *supra*.

That the appellant had been let to bail, and that the taking of a new bond had been waived, whatever effect it may have had upon his bondsmen, did not have the effect to release him from the custody of the law. Under section 989 it became the duty of the clerk, if he was not under bond or in actual custody, to issue a warrant to the sheriff, requiring him to take the defendant into his custody or take a new bond.

Unruh v. The State, *ex rel.* Baum.

That this was not done, however, did not discharge the defendant from legal custody, and that he voluntarily appeared, and was present at the trial without compulsion, neither changed his situation nor affected the jurisdiction of the court over him. *Lower v. Wallick*, 25 Ind. 68. He was in court subject to its jurisdiction, and in the custody of the law. If he had failed to appear, then, under the ruling in *Lucas v. Hawkins*, *supra*, the cause might have proceeded precisely as if he had been present. Whether a judgment could be taken under the provisions of section 986 against one who had not been arrested or otherwise notified of the proceeding, is not involved nor made a question in this case.

That the relatrix agreed to waive a bond and rely on the personal responsibility of the defendant, was of no moment. She could waive nothing which the law required. The proceeding was not for her benefit. The money to be secured was for the support of the illegitimate child. *Ex Parte Haase*, 50 Ind. 149.

The inability of the appellant to procure replevin bail, and the fact that he was without means to pay the judgment, are equally unavailing. *Reynolds v. Lamount*, 45 Ind. 308; *Ex Parte Teague*, 41 Ind. 278.

There is no error in the record. The judgment is affirmed, with costs.

Filed Feb. 20, 1886; petition for a rehearing overruled March 13, 1886.

No. 11,494.

UNRUH v. THE STATE, EX REL. BAUM.

APPEAL.—*Failure of Justice to Record Facts.*—*Dismissal.*—If an appeal has been in fact taken from a justice of the peace, his failure to note that fact in the docket is not a sufficient cause for dismissing the appeal.

SAME.—*Presumption as to Regularity of Appeal.*—*Supreme Court.*—Where the

106	117
107	180
105	117
139	210
105	117
140	365
105	117
148	258
105	117
157	386
105	117
159	12
105	117
183	498
105	117
164	161
105	1
170	1

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transcript filed in the circuit court does not affirmatively show that an appeal was taken from the justice, in the absence of anything to the contrary, it will be presumed in the Supreme Court that the appeal to the circuit court was regularly taken.

BASTARDY.—*Examination of Relatrix.—Waiver by Defendant.*—Where, at the hearing of a bastardy proceeding before a justice of the peace, the relatrix is not present and is not examined, but the defendant does not object to the hearing on that account and makes no effort to procure her attendance, he will be deemed to have waived her examination at that hearing.

INSTRUCTIONS TO JURY.—*Admissions.—Province of Jury.*—The trial court should not declare as matter of law what ought to be left to the jury as a matter of fact, and it is error to embody in an instruction a statement of law, taken from a text-book on evidence, setting forth the circumstances under which the admissions of parties would be entitled either to great or little weight.

SAME.—*Credibility of Witnesses.—Interest in Suit.*—An instruction that the jury should consider the interest of parties and other witnesses and the relationship of witnesses to the parties, in weighing their testimony, is erroneous as invading the province of the jury, and as indicating to them as matter of law that the testimony of such witnesses is entitled to less weight than that of others.

From the Porter Circuit Court.

E. D. Crumpacker, J. H. Gillette, H. A. Gillette and A. D. Bartholomew, for appellant.

A. L. Jones and F. P. Jones, for appellee.

ZOLLARS, J.—The relatrix filed with a justice of the peace a charge of bastardy against appellant, upon which he was arrested. The justice's record shows that on the day set for trial appellant was present in person and by attorney; that the State was represented by its prosecuting attorney; that the relatrix was not present; that the cause was submitted to the court for trial, and that there being no evidence offered in support of the charge made by the relatrix, the court found for the defendant, appellant. On the day following a transcript of the proceedings was filed in the circuit court. In that court appellant moved to dismiss the appeal, and to dismiss the case.

There was no contention or showing that an appeal had

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not been taken. The motion to dismiss the appeal was based upon the sole ground that the transcript of the proceedings in the justice's court does not affirmatively show that an appeal had been taken. If an appeal was in fact taken, the failure of the justice to note that fact in his docket is not a sufficient cause for dismissing the appeal. In the absence of anything to the contrary, we must presume in favor of the jurisdiction of the circuit court, by presuming that the case came into that court by a regular appeal. *Wolf v. State, ex rel.*, 11 Ind. 231; *Humble v. Williams*, 4 Blackf. 473; *Littell v. Bradford*, 8 Blackf. 185. See, also, *Houk v. Barthold*, 73 Ind. 21; *Johns v. State*, 104 Ind. 557; *Brown v. Anderson*, 90 Ind. 93; *Ohio, etc., R. W. Co. v. Hardy*, 64 Ind. 454; *Brownfield v. Weicht*, 9 Ind. 394.

The ground upon which appellant contends that the case should have been dismissed is, that the relatrix was not examined and her testimony reduced to writing by the justice, as provided by the statute. R. S. 1881, section 984.

It will be observed that on the day set for trial the relatrix was not present. The prosecuting attorney announced himself as ready for trial. Without any objection from appellant, who, with his attorney, was present, and without any effort upon his part to have the relatrix present and to have her testimony taken and reduced to writing, the case was submitted to the court for trial.

The examination of the relatrix provided by the statute is for the benefit and protection of the defendant, and he should not be deprived of it by any ingenious practice by those representing the State. The right to such an examination, however, is a right that the defendant may waive. *Smith v. State, ex rel.*, 67 Ind. 61.

In this case, appellant must be treated as having waived that right. If he desired an examination of the relatrix and her testimony reduced to writing, he might have procured a subpoena, and thus had her brought before the court. He was bound to know that the State could appeal, and that the case

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would thus go to the circuit court without the examination of the relatrix, unless by some effort of his that examination was procured. Having made no such effort, he can not now be heard to complain that the examination was not taken.

Appellant assigned as a cause for a new trial the giving of the fifth, sixth and ninth of the court's instructions.

The ninth is as follows: "Certain admissions claimed to have been made by both the relatrix and also by the defendant are in evidence. Such admissions are competent evidence, and may be of the most satisfactory character, or they may be the very weakest kind of testimony, depending upon the surrounding circumstances. If you can see from the evidence that the alleged admissions were clearly and understandingly made; that they are precisely identified; that the language is correctly remembered and accurately repeated by the witness, then such testimony is entitled to *great weight*. On the other hand, if the person making the admission may not have expressed his or her own meaning, clearly and understandingly; or if the witness may have misunderstood him or her; or if the witness had no reason or motive for remembering the exact language used; or if from lapse of time it is seen that the witness is liable to be mistaken; or if from interest, bias or prejudice, the admission appears to be unreasonable, or colored and exaggerated, then but little reliance should be placed upon this class of testimony."

This instruction starts out with a statement of what is a fact, that there is evidence of admissions both by the relatrix and by appellant. Then follows the enunciation of two propositions of law. The first is, that if the jury could determine from the evidence that the admissions were clearly and understandingly made; that they were precisely identified; that the language was correctly remembered and accurately repeated by the witnesses, then, as a matter of law, such testimony was entitled to great weight.

The second is, that if the person making the admission may not have expressed his or her own meaning clearly and

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understandingly; or if the witnesses may have misunderstood him or her; or if the witness *had no reason or motive for remembering the exact language used*; or if from lapse of time it is seen that the witnesses are liable to be mistaken; or if from interest, bias or prejudice, the admissions appear to be unreasonable, or colored and exaggerated, then, as a matter of law, but little reliance should be placed upon the testimony of such admissions.

The instruction is substantially a copy of section 200, 1 Greenleaf on Evidence. We have no fault to find with that section as an abstract proposition, but this court has several times held that to embody it in an instruction to the jury is erroneous, because the court thereby declares as a matter of law what ought to be left to the jury to determine as a matter of fact. In speaking of embodying the text of law writers in instructions, this court, in the case of *Garfield v. State*, 74 Ind. 60, said: "It is not every statement of the law found in a text-book or opinion of a judge, however well and accurately put, which can properly be embodied in an instruction. The processes of reasoning by which a conclusion is reached, if well made, are appropriate to be found either in text or opinion, but rarely, if ever, is it proper to deliver such reasoning to a jury in the form of instructions."

In the case of *Davis v. Hardy*, 76 Ind. 272, in speaking of an instruction, in all essentials identical with that under consideration, and of the above section from Greenleaf, this court said: "To give it in a charge, as written, would in this State, be an invasion of the jury's exclusive right to judge of the credibility and weight of evidence. It is proper matter of argument that such evidence is subject to imperfection and discredit, for the reasons suggested, and the court may direct the jury's attention to the subject. But it is not for the court to say, as matter of law, in reference to the evidence of this kind, given in a particular case, that it is subject to much imperfection; or that 'it frequently happens that the witness, by unintentionally altering a few expres-

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sions really used, gives an effect to the statement completely at variance with what the party did say ;' or that, 'where the admission is deliberately made and precisely identified, the evidence is often of the most satisfactory nature.' These are matters of fact, experience and argument, but not otherwise the subject of legal cognizance."

The same question came before the court in the case of *Finch v. Bergins*, 89 Ind. 360. There, again, the above section from Greenleaf was embodied in an instruction and given to the jury. The cases of *Garfield v. State* and *Davis v. Hardy*, *supra*, were fully approved and the instruction condemned. These cases were all cited and approved in the cases of *Newman v. Hazelrigg*, 96 Ind. 73; *Koerner v. State*, 98 Ind. 7; *Lewis v. Christie*, 99 Ind. 377; *Morris v. State, ex rel.*, 101 Ind. 560. The ruling in these cases is supported by authority elsewhere.

In the case of *Castleman v. Sherry*, 42 Texas, 59, in speaking of a charge similar to that under examination, the court said: "The charge is further objectionable as being upon the weight of the evidence, when the court tells the jury that evidence of the admissions of a party is regarded as dangerous and liable to abuse, etc. Such expressions as these, found in every treatise on evidence, are to be regarded as matters of argument rather than rules of evidence having the force of law, upon which the court should instruct a jury." See, to the same point, *Commonwealth v. Galligan*, 113 Mass. 202; *Mauro v. Platt*, 62 Ill. 450; *Thomp. Charging the Jury*, p. 60, section 37.

The instruction applies to the declarations and admissions by both the relatrix and appellant, but that does not render it less erroneous, because the court no less invaded the province of the jury. Nor can it be said that the instruction is less harmful to appellant. The jury may have applied one standard to the evidence of admissions by the relatrix, and placed "but little reliance" upon it, and applied the other standard to the evidence of admissions by appellant, and given

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it "great weight." They may have concluded, under the instruction of the court, that because the witness, or witnesses, "had no reason or motive for remembering" the admissions by the relatrix, "but little reliance" should be placed upon their testimony. However considered, the instruction is erroneous.

The sixth instruction given by the court is as follows: "The relatrix and defendant have testified, and they are both interested in the event of the suit. This fact should be considered in weighing their evidence, in connection with the other facts and circumstances which I have indicated apply to witnesses generally."

We think that this instruction is also erroneous. It very clearly discredits the parties named, because they are interested in the event of the suit. The charge is, that it was the *duty* of the jury to consider the fact that the parties named were interested in the event of the suit. The jury would not understand that on account of that interest greater weight was to be given to the testimony of the interested parties. Very clearly, they understood that they were to give less weight to that testimony.

In speaking of a similar charge, it was said, in the case of *Dodd v. Moore*, 91 Ind. 522: "The jury have the right, in all cases, in weighing and settling conflicts in testimony, to consider the interest which the witnesses may have in the result of the litigation; and it is proper to instruct them that they may exercise that right. It may be that in many cases witnesses unconsciously warp and color their testimony by reason of interest; and it may be that in many instances witnesses purposely falsify by reason of such interest; but whether such is the fact, in any given case, is a question of fact to be left to the jury. Surely the courts can not say, as a matter of law, that because a witness may have an interest in the litigation, less weight should be given to his testimony."

The reasons that condemned the instruction in that case condemn the above instruction in this case. See, also, as in

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point, *Woollen v. Whitacre*, 91 Ind. 502, and cases there cited; *Nelson v. Vorce*, 55 Ind. 455; *Greer v. State*, 53 Ind. 420; *Hartford v. State*, 96 Ind. 461; *State, ex rel., v. Sutton*, 99 Ind. 300; *Thomp. Charging the Jury*, 58, 59.

Here again, the instruction applies alike to the relatrix and to appellant, but that in no way cures the error. But for the instruction casting discredit upon appellant's testimony because of his interest, the jury might have given full credit to his testimony and returned a different verdict.

The fifth instruction is open to the same objection. So much of it as needs to be here set out is as follows: "The jury are the judges of the credibility of the witnesses, and in determining the weight to be given to the testimony of the different witnesses, you should consider the relationship of the witnesses to the parties, their interest in the event of the suit," etc. Here again, it is enjoined upon the jury as a *duty*, in determining the credibility of witnesses, to consider their interest in the event of the suit, and their relationship to the parties. And here again, by the phraseology of the instruction, discredit is thrown upon the classes of witnesses named. One of the witnesses in this case, and one of the most important witnesses for appellant, was his father, who contradicted the relatrix upon the vital points in the case. By the above instruction, discredit is thrown upon his testimony by reason of his relationship to appellant. The jury had a right to consider that relationship, if they thought it worthy of consideration, and might have been instructed as to that right, but to enjoin it as a duty, implied infirmity in the testimony by reason of the relationship.

In these instructions, the court not only invaded the province of the jury, but indicated to them that, as a matter of law, the testimony of some of the witnesses was entitled to less credence than the testimony of others. For these reasons the judgment must be reversed.

Many other questions are discussed by appellant's counsel,

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but as they may not arise upon another trial, it is not necessary that we should decide anything in relation to them.

The judgment is reversed, at the cost of the relatrix, and the cause remanded with instructions to the court below to sustain appellant's motion for a new trial.

Filed Jan. 26, 1886.

No. 12,119.

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CRIMINAL LAW.—Self-Defence.—General Rule.—Exception.—It is the general rule that a brother may lawfully defend his brother when in peril, and, if need be, take life in such defence, but where both brothers are in fault, and unite in bringing on the fatal rencounter, this rule does not apply. **SAME.—Jurisdiction.—Waiver of Irregularity.**—Where a judge assumes to act under lawful authority, his acts will not be void, and if in a criminal case the accused voluntarily goes to trial without objection, an objection after conviction will be too late to be of avail.

COURTS.—Adjourned Term.—Jurisdiction.—Where a judge, having statutory authority to appoint an adjourned term of court, does make an order in term time for holding an adjourned term, causes notice of such adjourned term to be given, appears at the time and opens court, the proceedings at such a term are not void although held at a time when another court of the same circuit might have been in session under the statute, and was in session, presided over by a special judge.

From the Whitley Circuit Court.

S. E. Sinclair and *H. C. Hanna*, for appellant.

C. M. Dawson, Prosecuting Attorney, *H. Colerick* and *W. S. Oppenheim*, for the State.

ELLIOTT, J.—On the 22d day of September, 1883, the Whitley Circuit Court, then being regularly in session, entered an order directing that an adjourned term be held commencing on the 29th day of October, 1883, and notice was given of the adjourned term according to law. The time

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130	21
105	125
131	588
105	125
135	207
105	125
137	15
105	125
142	347
105	125
149	643
105	125
153	320
105	125
155	388
105	125
158	682
105	125
165	350

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fixed in the order was a time when, under the provisions of the statute, the court in Kosciusko county might be in session, and Kosciusko county in conjunction with Whitley county constituted the thirty-third judicial circuit. The court in the former county was actually in session on the 23d day of October, 1883, and continued in session during the time the trial of the appellant was in progress, the judge of the thirty-third circuit having appointed a special judge to hold that court. The adjourned term of the Whitley Circuit Court, at which the appellant was tried, was held by the duly elected judge of that court. The appellant entered into trial without any objection, and made none until after verdict, and then, for the first time, presented the question of the authority of the judge of the thirty-third judicial circuit to hold the adjourned term.

The statute fixes the time for holding the courts in the thirty-third circuit, and we know judicially that the September term, 1883, of the Whitley Circuit Court, began on Monday, September 3d, and ended on the 22d day of that month. We know, also, that the September term of the Kosciusko Circuit Court began on the Monday following the close of the Whitley Circuit Court, and as the term of the latter court began on the day named, Monday, September 24th, 1883, it had been in session five weeks when the judge convened the adjourned term pursuant to the order previously made and in accordance with the notice duly given. The statute provides that the length of the term of the Kosciusko Circuit Court shall be seven weeks "if the business thereof requires it," but there is no command that it shall continue for that length of time. This statute can not be regarded as absolutely fixing the term at that period, for it declares that it shall continue for that length of time upon condition that the business shall require it. The question whether the business requires that the full term of seven weeks shall be occupied is one to be decided by the judge, for it is not determined by any provision of the statute. *Casily*

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v. *State*, 32 Ind. 62; *Swails v. Coverdill*, 21 Ind. 271. As the decision of the question as to the length of time that the court shall sit is committed to the judge, his judgment must settle the question, and even if it be conceded that it is a decision that can be reversed on appeal, there must be an objection and an exception in order to present any question for review, for his decision can in no event be anything more than erroneous. This reasoning leads us to the conclusion that the judge was not bound to sit the full period of seven weeks in Kosciusko county, but might abridge the term by an adjournment. It was, therefore, within his power to shorten the term of that court, and if he exercised this authority directly by an order of adjournment, or indirectly by opening an adjourned term in another county of his circuit, it would seem to logically result that the adjourned term would be the one regularly held, and the term left to be held by the special judge be the one that was irregularly held. It is difficult to perceive why the adjourned term held pursuant to an order made in regular session, and held by the duly qualified judge himself, should not be deemed the only legal term. But we do not find it necessary to go to that extent in this case, for it is sufficient for our present purpose to declare that the judge of the thirty-third circuit had authority to abridge the term of the Kosciusko Circuit Court, and that, as he did have this authority, his act in appointing an adjourned term of the Whitley Circuit Court was not void. Where a court has general authority over a class of cases or a general subject, a ruling or order made by it is not void, although it may be erroneous. As said in *Snelson v. State, ex rel.*, 16 Ind. 29: "But the power to decide at all carries with it the power to decide wrong as well as right." *Lantz v. Maffett*, 102 Ind. 23; *Quarl v. Abbett*, 102 Ind. 233, see p. 239. The authority to shorten the length of the term in Kosciusko county carried with it the authority to create a vacation by ending that term, and whether the court did or did not err in deciding that there should be a vacation in the Kosciusko

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Circuit Court on and after October 29th, or whether it did or did not make a mistake in the procedure adopted, is immaterial, for no matter how much there is of error in the proceedings of a superior court, the proceedings are not void unless the court transcends its jurisdiction. We need not inquire what the rule would be if the statute had positively fixed the length of the terms of the Kosciusko Circuit Court at seven weeks, for the term was not definitely fixed, but its duration, within the limits prescribed, was left to be determined by the court itself. The utmost that can be granted the appellant is that the adjourned term was held under an order erroneously made; it can not be declared that it was held without any authority whatever, and unless it was so held the proceedings were not void.

There is high authority for the proposition that, independent of statutory warrant, courts of superior jurisdiction have authority to hold adjourned terms. *Mechanics' Bank v. Withers*, 6 Wheat. 107; *Harris v. Gest*, 4 Ohio St. 469; *Casily v. State*, *supra*. We have, however, a statute authorizing courts to appoint adjourned terms, and a court assuming to act under that statute can not be said to act without color of authority, although it may proceed erroneously. The only possible objection to the proceedings of the court in this instance is, that it fixed the time for holding the adjourned term at a time when another court in the same circuit might have been in session; but, as the term of the other court might have been abridged by the order of the judge so that it would not have been in session at the time fixed for the adjourned term, and as the order for the adjourned term was made while the court was lawfully in session, and under a statute conferring authority to hold adjourned terms, the order for holding that term can not be regarded as void. The utmost that can be justly said in impeachment of that order and the acts done under it, is that they were erroneous, since the mistake, if mistake there was, consisted solely in wrongly deciding upon the force and effect of the statute. We do not

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controvert the general doctrine that a court can not be held at a time when there is clearly no authority to hold it; nor do we impugn the general doctrine that it is error to hold two courts in the same circuit at the same time, where there is no statutory provision authorizing it. *Cain v. Goda*, 84 Ind. 209; *Batten v. State*, 80 Ind. 394; *McCool v. State*, 7 Ind. 378; *Dunn v. State*, 2 Ark. 229; *In re Millington*, 24 Kan. 214; *Garlick v. Dunn*, 42 Ala. 404; Freeman Judg., section 121.

It is not necessary to question the soundness of the general doctrine stated, for here there was power in the court to create a vacation by an order, and there was also power to order an adjourned term, so that here there is no question as to the existence of power in the court to make a decision, but the sole infirmity in the proceedings relates to the mode of exercising the power residing in the court. In every case in which a court makes an erroneous ruling there is a wrongful exercise of authority, but such a wrongful exercise of authority does not render the proceedings void, although it does make them erroneous. The question of power or authority might, perhaps, have arisen had the adjourned term been fixed at a time when the law imperatively required that the Kosciusko Circuit Court should be in session, but its adjourned term was not fixed at a time when that court was required to be in session; on the contrary, it was fixed at a time when the judge might rightfully have adjourned that court. This feature is a prominent one, and distinguishes the case from such cases as that of *In re Millington*, *supra*. If the judge had made the proper order declaring the Kosciusko Circuit Court adjourned after five weeks of the term had expired, as he undoubtedly might have done, there could have been no question as to the regularity of the adjourned term held by him in Whitley county, and the error in this respect, while it might, perhaps, have been available had objection been seasonably made, can not be deemed to render the order for the

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adjourned term void, and if that order was not void, the trial at that term was not a mere nullity. *Casily v. State*, 32 Ind. 62; *Knight v. State*, 70 Ind. 375; *Labadie v. Dean*, 47 Texas, 90; *State v. Clark*, 30 Iowa, 168; *Cook v. Smith*, 54 Iowa, 636.

Principle and authority logically lead to the conclusion that nothing worse can be said of the adjourned term than that it was irregularly held; it can not be justly affirmed that it was held without color of authority.

In the case of *State v. Knight*, 19 Iowa, 94, it was held that a judge might continue a term of court into the time fixed by law for holding a court in the same district, and the earlier cases of *Davis v. Fish*, 1 Greene, Iowa, 406 (48 Am. Dec. 387, see n. p. 392), and *Grable v. State*, 2 Greene, Iowa, 559, were in effect overruled. It was held by the same court in *Weaver v. Coolidge*, 15 Iowa, 244, that a judgment rendered three days after the time fixed for the commencement of another court in the same district was not void, and in *State v. Clark*, *supra*, and *Cook v. Smith*, *supra*, like rulings were made. In the very recent cases of *State v. Stevens*, 25 N. W. R. 777, and *State v. Peterson*, 25 N. W. R. 780, it was held that a judgment pronounced at a term continued after the time fixed for another term of the same district was not even erroneous. The Supreme Court of Wisconsin, in *State v. Leahey*, 1 Wis. 225, denied the doctrine of the two early Iowa cases, as well as that of *Archer v. Ross*, 2 Scam. 303, and decided that holding a court during the time designated by law for holding another court in the same judicial circuit did not invalidate the proceedings.

In the case of *State v. Montgomery*, 8 Kan. 351, a like doctrine was declared. In this last case it was said: "The Legislature have named the day for the opening of a term, but have not for the closing. That is confided to the discretion of the judge, and is determined by the amount of business and the necessity of suitors." This is the case here; the time is fixed for opening, but not for closing, the Kosciusko Circuit

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Court; that, as we have seen, was left to the judgment of the judge. *Brewer v. State*, 6 Lea, 198, decides that although a judge *pro tempore* appoints an adjourned term, and orders it to be held at a time when another court of the same circuit might be in session, the proceedings are not void. The court placed its decision upon the same principle as that which sustains the rulings of a judge *de facto*, and said, among other things: "Nor does the fact that the term of another court of the circuit commenced in the interval, affect the result. This very point arose and was decided in favor of the validity of the proceedings in *Cheek v. Merchants' Nat'l Bank*, 9 Heiskell, 489."

In *Venable v. White*, 2 Head, 582, it was held that where no objection is made, and there is color of authority for holding the term, although the statute under which the judge assumed to act had been repealed, still the proceedings were not void. It was there said: "There can be no doubt whatever, upon reason and authority, that a judgment given by a judge *de facto*, sitting and holding court at the proper time and place, is as valid and free from error as a judgment pronounced by a judge rightfully in office. If so, upon what reason shall we hold that the judgments and decrees of a judge regularly in office are erroneous, because he held his court under color of a law that turned out to be repealed or invalid?" In *Henslie v. State*, 3 Heisk. 202, the same general principle is declared.

The cases, and among them our own, declare that where an adjourned term is held under color of authority, it will be presumed that it was properly ordered and held. *Porter v. State*, 2 Ind. 435; *Shirts v. Irons*, 28 Ind. 458; *Harper v. State*, 42 Ind. 405; *Cook v. Skelton*, 20 Ill. 107; *State v. Clark*, *supra*; *Cook v. Smith*, *supra*. This principle justifies the conclusion that where there is color of authority the proceedings can not be deemed void, since it is an elementary rule that no presumption can sustain a void act.

The principle which governs in cases in which the court is

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held by a judge *de facto* is essentially the same as that which governs the present. If a judge not legally elected or qualified may, if acting under color of authority, pronounce valid judgments, it can not be doubted that, upon the same principle, judgments pronounced at a term not legally held, but yet held by the duly qualified judge under color of law, must be valid. The reason for the rule is stronger and clearer where the judge *de jure* holds a term of court at an improper time, but under color of authority, than where a term of court is held by a judge who actually has no legal right and simply acts under color of authority, yet the law is quite well settled that the acts of a judge, who is only such *de facto*, are not void. We have many cases in our own reports declaring and enforcing this general rule. The decision in *Case v. State*, 5 Ind. 1, supplies a striking illustration. In that case there was a vacancy in the office of judge, and the sheriff and clerk, without any authority whatever to appoint a judge where the office was vacant did appoint a judge *pro tem.*, who held a term of court, and it was decided that his acts were not void. The court there said: "The appointment constitutes a part of the record. It appears in legal form, and gave to the appointee at least a colorable title to the office. He was no usurper, but supposed himself to be rightfully invested, and acted in good faith. A court *de facto*, if not *de jure*, was thus constituted: During the trial, no attempt was made to impeach the authority of that court. And after conviction it was too late to question the validity of the title under which its duties were exercised." This doctrine has been adopted and acted upon in many cases. *Jones v. State*, 11 Ind. 357; *Shattuck v. State*, 11 Ind. 473, p. 478; *Feaster v. Woodfill*, 23 Ind. 493, see p. 497; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *State, ex rel., v. Murdock*, 86 Ind. 124; *Moore v. Trimble*, 94 Ind. 153; *Rogers v. Beauchamp*, 102 Ind. 33.

In *Taylor v. Skrine*, 2 Tread. (S. C.) 696, it was held that the acts of one claiming to be a judge by virtue of an unconsti-

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tutional statute were not void, and this doctrine was approved in *Creighton v. Piper*, 14 Ind. 182. The decision in *Gumberts v. Adams Express Co.*, 28 Ind. 181, is that where a party goes to trial before an acting justice of the peace without objection, he can not, on appeal, be heard to question the authority of the justice to try the cause.

In *Oppenheim v. Pittsburgh, etc., R. W. Co.*, *supra*, it was held that where a party went to trial before a judge *de facto*, he waived all questions as to the right of the judge to hear and decide the case. We have many cases declaring that where a party goes to trial without objection before a judge assuming to act under color of authority, he can not, after judgment or conviction, successfully make the objection that the judge had no authority to try the cause. *Feaster v. Woodfill*, *supra*; *Mitchell v. Smith*, 24 Ind. 252; *Watts v. State*, 33 Ind. 237; *Winterrowd v. Messick*, 37 Ind. 122; *Rose v. Allison*, 41 Ind. 276; *Kennedy v. State*, 53 Ind. 542; *State, ex rel., v. Murdock*, *supra*; *Fassinow v. State*, 89 Ind. 235; *Adams v. Gowan*, 89 Ind. 358; *Huffman v. Cauble*, 86 Ind. 591; *Board, etc., v. Seaton*, 90 Ind. 158; *Kenney v. Phillipy*, 91 Ind. 511; *Myers v. State*, 92 Ind. 390, see p. 396; *Wood v. Franklin*, 97 Ind. 117; *Rogers v. Beauchamp*, *supra*.

Other cases proceeding upon the same general principle hold that "The statute fully authorizes the court to hold an adjourned term for the purpose of completing the business undisposed of, and the contrary not appearing," the Supreme Court "will presume that the court was regularly held and the cause properly brought to trial." *Wood v. Franklin*, *supra*; *Shirts v. Irons*, *supra*; *Hanes v. Worthington*, 14 Ind. 320. A similar ruling was made in *Shircliff v. State*, 96 Ind. 369.

There is some confusion, and perhaps conflict, in the earlier cases, but the later cases, supported, as they are, by all the well considered cases in our reports, must be regarded as firmly settling the rule, that where a judge assumes to act under lawful authority, and there is color of authority, his acts

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will not be void, and that if the party voluntarily goes to trial without objection, an objection after conviction will be too late to be of avail. This is in harmony with the great weight of authority elsewhere. *Bank of North America v. McCall*, 4 Binney (Pa.) 371; *State, ex rel., v. County Court*, 50 Mo. 317; *Blackburn v. State*, 3 Head, 690; *Clark v. Com.*, 29 Pa. St. 129; *Com. v. Hawkes*, 123 Mass. 525; *Com. v. Taber*, 123 Mass. 253; *Sheehan's Case*, 122 Mass. 445; *State v. Anone*, 2 Nott & Mc. 27; *State v. Alling*, 12 Ohio, 16; *Mastersson v. Matthews*, 60 Ala. 260; *Mayo v. Stoneum*, 2 Ala. 390; *State v. Carroll*, 38 Conn. 449.

The ultimate conclusion which we have reached is this: Where a judge, having statutory authority to appoint an adjourned term of court, does make an order in term time for holding an adjourned term, causes notice of such adjourned term to be given, appears at the time appointed and opens court, the proceedings at such an adjourned term are not void although held at a time when another court of the same circuit might have been in session under the statute, and was in session, presided over by a special judge.

As the proceedings were not void, the failure of the appellant to object at the trial is a waiver of all questions as to the regularity of the proceedings at the adjourned term. If he had made an objection before conviction, we should have been faced by a very different question from that which the record presents. It is not necessary for us to decide, nor, indeed, would it be proper for us to do so, what would be the rule if an objection were made before trial to proceedings at an adjourned term held under such circumstances as that at which the appellant was convicted.

The conclusion which we have reached does the appellant no substantial injury, for he was tried by the rightful judge and was denied no right for which he asked. The utmost that can be said is, that the adjourned term was irregularly held by the proper judge, and, as the appellant lost no substantial rights by the alleged error of the judge, and made no

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objection until after trial, we can not, under the rule declared by our statute and enforced by our decisions, reverse the judgment.

From the earliest to the latest of our decisions, it has been held that where there is an irregularity in the proceedings it is waived by a failure to object at the proper time. Our cases carry this doctrine so far as to hold that there may be a waiver of constitutional rights, and in this they are sustained by the great weight of authority. *Lowery v. Howard*, 103 Ind. 440; *Thomas v. State*, 103 Ind. 419; *Butler v. State*, 97 Ind. 378; "Waiver of Constitutional Rights in Criminal Cases," 6 Crim. Law Mag. 182; *In re Staff*, 63 Wis. 285.

It results from this principle that the failure of the defendant to object before conviction concludes him from questioning the regularity of the proceedings at the adjourned term. This conclusion is in harmony with the spirit of our criminal code, which, while it awards to an accused liberal and ample opportunity to present objections to the rulings of the trial court, requires that all objections should be seasonably presented to that court. The rule is just in itself, and salutary in its practical operation. An accused who voluntarily enters upon a trial without objecting to the regularity of the order appointing the term at which he is tried, and takes the chances of a trial, ought not, after conviction, to be permitted to object that the term was not regularly held, since such a practice would enable a felon to oftentimes defeat justice by securing delay. And it would entail upon the courts and the public an expense and inconvenience that one accused of crime has no right to demand that they should be compelled to bear.

It is the general rule that a brother may lawfully defend his brother when in peril, and, if need be, take life in such defence, and so the law was declared in the instruction of the trial court which is assailed in argument. But this general rule is not without exceptions. Where both the brothers are in fault, and unite in wrongfully bringing on the fatal encounter, the general rule does not apply. It would be rank

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injustice to permit a man who has joined his brother in attacking another, to take the life of the person whom they had wrongfully attacked, at least without retreating, or, in good faith, attempting to retreat. It may be, that if the appellant had not been a participant in the combat he might lawfully have interfered in defence of his brother, for the law allows a brother, in case of need, to defend a brother. *Waybright v. State*, 56 Ind. 122; 1 Bishop Crim. Law, section 877. But there are well reasoned cases holding, that if the brother in whose defence the accused engages is in the fault, and has not retreated, or attempted to retreat, the interference is not justifiable or excusable. *Cain's Case*, 20 W. Va. 681; *State v. Greer*, 22 W. Va. 800, see pp. 818, 819.

In this case, however, we need not go so far as the court did in the cases referred to, for here the instruction proceeds, as well it may under the evidence, upon the hypothesis that both of the brothers were participants and principals in the encounter that resulted in the killing of the deceased. 1 Bishop Crim. Law, section 604; 1 Whart. Crim. Law, section 478. In such a case, the accused can not go acquit on the ground of self-defence if he was himself in fault and so continued. *Barnett v. State*, 100 Ind. 171; *Story v. State*, 99 Ind. 413; *McDermott v. State*, 89 Ind. 187; *Presser v. State*, 77 Ind. 274.

If, however, we were wrong in our construction of the instruction and in our view of the law, the judgment could not be reversed, for the reason that the contention of the State, stoutly made and earnestly pressed, that the motion for a new trial does not assign for error the giving of the instruction here assailed, must be sustained.

We can not reverse upon the evidence. Two juries have convicted upon it, two trial judges have sustained these convictions, and, when the case was here before upon substantially the same evidence, this court, after adverting to the theory of the defence, said: "At all events, as there is evidence in the record fairly sustaining the verdict, we can not

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disturb the judgment of the court below upon the sufficiency of the evidence." We have, notwithstanding the fact that two juries have convicted, and two trial judges approved the convictions, and the further fact that this court has once sustained the contention of the State as to the sufficiency of the evidence, again carefully examined the evidence, and can reach no other conclusion than that it sustains the verdict. There may possibly be mitigating circumstances that would render the exercise of executive clemency proper, to mitigate the severity of the punishment, but, however this may be, there is nothing that will justify us in setting aside the verdict.

Judgment affirmed.

Filed Jan. 26, 1886.

No. 11,595.

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105	137
170	343

CONTRACT.—*Delay in Performance.—Damages.*—Where a contractor in good faith enters upon the performance of a contract, and incurs expense, the employer having notice of that fact, if such employer, either by an order or by negligently failing to perform an essential part to be performed by him, suspends the execution of the contract, upon a resumption and completion of the work under the contract, it will be implied that all loss necessarily occasioned by such suspension, of which the employer is at the time notified, shall fall upon him.

SAME.—*Breach of.—Measure of Damages.*—Where, on account of a failure by the employer to perform preliminary work, which, under the contract, he is required to perform, before the contractor can proceed with the work he is to perform under the contract, the latter is unable to proceed, and the work is suspended, to the injury of the contractor, without his consent, of which the employer has notice, such contractor, although he may have afterwards completed the work under the contract, may, in addition to the contract price, recover all his actual damage occasioned by such delay, including injury to tools, and interest at six per cent. for the period of the delay on all moneys invested in materials which he

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was bound to and did furnish, and in the labor necessary in furnishing the same.

SAME.—Instruction.—In an action to recover the contract price for work performed under a special contract, and damages for a breach of the provisions of the contract by the employer, whereby the work was delayed, etc., where it appears that on account of the failure of the employer to do certain preliminary work necessary to be done by him, before the contractor could begin to perform his part of the contract, the latter was not able to so commence his work until after the time fixed in the contract for the completion of the work, an instruction, asked by the defendant, to the effect that if at such time the employer had not performed such preliminary work, and the contractor was not ready with materials to commence the performance of his part of the contract, the latter was under no obligation to hold himself in readiness to do the work, and that unless the jury believed that a new agreement was afterwards made the plaintiff could not recover, was correctly refused.

PLEADING.—Uncertainty of Complaint.—Evidence.—Variance.—Where the allegations of a complaint are too general and uncertain, and the defendant has made no motion to have them made more specific, he can not complain of a variance, if such allegations are made more certain by proof on the trial.

SAME.—Variance.—It is only where the evidence shows a state of facts different from that averred in the complaint that a fatal variance may be claimed.

From the Vanderburgh Circuit Court.

S. B. Vance, for appellant.

C. A. De Bruler, C. Denby, D. B. Kumler and A. Gilchrist, for appellees.

MITCHELL, J.—On the 25th day of July, 1881, a written contract was made between the Louisville and Nashville Railroad Company and Archibald Hollerbach for the construction by the latter of two stone T (tee) abutments at Pigeon creek, on the St. Louis division of the Louisville and Nashville Railroad in the city of Evansville. The material provisions of the contract are as follows:

1. That Hollerbach should furnish all the material except cement and sand, and build the abutments according to plans and specifications furnished by the company, the specifications to form part of the contract.

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2. That the stone should be obtained from the Cannelton quarries in this State, and be taken from the quarries to the bridge site at the expense of Hollerbach; but if the water in Pigeon creek should become too low for the use of barges, the company should furnish cars to transport the stone from the river to the bridge site, but that he should load it on the cars and unload it at the bridge site promptly.

3. That the company should furnish the foundations and the cement and sand, and that the job should be completed by the 20th day of November, 1881.

4. The company was to pay him nine and $\frac{20}{100}$ dollars for each cubic yard of stone laid in the abutments off of barges at the bridge site, and nine and $\frac{25}{100}$ dollars for each cubic yard of stone laid in the abutments off of cars at the bridge site.

5. The payments were to be made as follows: "Estimates of masonry laid will be made at the end of each month, and from the estimate twenty per cent. will be retained until the whole job is completed, when a final estimate will be made at the above specified rates, and all previous estimates deducted therefrom."

Pending this contract, the benefit of it was assigned by Hollerbach to Simeon Jaseph.

The abutments were completed in the spring of 1883, and this suit was brought by Hollerbach to recover of the defendant a balance alleged to be due for the work, as by the contract, and also to recover damages for certain breaches of the contract therein alleged. Jaseph was made a defendant because of the assignment, which is alleged to have been only as collateral security for certain advances claimed at the date of the suit to have been repaid him.

The complaint was in two paragraphs. After alleging the execution of the contract, the substantial grounds of complaint in the first paragraph are as follows:

1. That under the contract the plaintiff proceeded to construct the piers and finally constructed them to the approval

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of the superintendent of bridges of the defendant, putting into the piers, from stone unloaded from cars, sixteen hundred and ninety-one cubic yards, of the value, according to the contract price, of sixteen thousand eight hundred and twenty-nine $\frac{45}{100}$ dollars; that the plaintiff, at the special instance and request of defendant, put into the piers work, material and labor to the amount of one hundred and forty dollars, which was extra and in no way contemplated by the terms of the written contract.

2. That, according to the terms of the contract, the defendant was to prepare the foundations of the work ready to receive the masonry to be furnished and constructed by the plaintiff, by the 25th day of July, 1881; but that, although the plaintiff was ready with his tools, machinery, hands, material, barges and other things necessary for the construction of the piers at the time fixed in the contract, yet the defendant wholly neglected and refused to prepare the foundations as it had agreed to do, until the lapse of fifteen months after the time it had fixed; that by reason of the failure of the defendant to perform its part of the contract in the preparation of the foundations, the plaintiff was greatly injured and damaged in this:

1. That he was compelled to pay out and expend, and did pay out and expend in extra handling of stone, made necessary by the delay in the preparation of the foundations, the sum of twenty-four hundred dollars; that by reason of the delay he was compelled to unload his material from the barges on to the river bank, and then reload on to the barges and reload on the railroad cars, to his great damage.

2. That he was further greatly injured and damaged by the delay of the defendant, in this: loss of time of plaintiff, and of non-use of ropes, blocks, derricks and other tools and machinery, loss and destruction of material, and wear and tear and injury to ropes, blocks, derricks and other tools and machinery, by reason of exposure and the delay in the use of material which he had furnished and paid for, being

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interest on fifty-five hundred dollars for fifteen months, in all, the sum of twenty-five hundred dollars.

3. That by the terms of the contract the defendant agreed to furnish to the plaintiff all the cars necessary for the fast completion of the work, upon application of plaintiff, so that plaintiff should not be hindered in the work for want of cars; that after the foundations were completed and the plaintiff began the construction of the piers, he repeatedly made application to the defendant for cars for the transportation of stone to the bridge site, and defendant failed, neglected and refused to furnish plaintiff cars, by which he was greatly delayed in the work, that is to say, for one hundred days, to his damage fifteen hundred dollars.

It is averred that the defendant paid to the plaintiff the sum of eleven thousand dollars "or thereabouts," and that there is still due him on the contract, and for damages, the further sum of eleven thousand dollars, which the company refuses to pay.

The second paragraph contains the following additional grounds of complaint:

1. That the defendant was, by the terms of the contract, to furnish the foundations for the abutments according to the plans and specifications submitted at the time of making the contract, which were part of the contract; that defendant failed to construct the foundations according to the plans and specifications, in this: that the stems of the abutments were shortened two feet after the stone therefor had been delivered, at a cost of seven dollars per cubic yard, and that the shortening of the stems necessitated a great waste of stone which had been prepared and delivered, and which had to be chipped off, in all, ninety cubic yards, of the value of eight hundred dollars, and to the damage of this plaintiff eight hundred dollars.

2. That by the terms of the contract and changes made in the construction of the abutments, they were finally completed of a height of eighteen inches less than required by

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the plans and specifications, by which the plaintiff was damaged in preparing and delivering thirty-three cubic yards of stone of the value of two hundred and fifty dollars, to his damage two hundred and fifty dollars.

The defendant moved the court for an order requiring the plaintiff to separate so much of his complaint as sought to recover for work done, in pursuance of the contract, into one action, and so much thereof as counted upon damages for the defendant's default, into a separate action.

This motion was overruled, and the ruling excepted to, but no question is made upon this ruling here. Pending the suit an order was made, by agreement of parties, to the effect that the railroad company should pay to Simeon Jaseph the sum of three thousand and thirty-seven dollars and ten cents, whose receipt therefor, according to the order, should be an acquittance to the company for that amount, both as against Jaseph and Hollerbach, and that such payment should be without prejudice to Hollerbach for any sum which he claimed in excess of that amount from the railroad company.

The defendant answered in five paragraphs, but as it is not material to any question to be considered, the answer is not further noticed. It took issue with all the material averments in the complaint.

The cause having been submitted for trial to a jury, a verdict in favor of plaintiff for three thousand three hundred and ninety-seven dollars and thirty-three cents was returned.

The overruling of the motion for a new trial is the only error assigned here.

This assignment brings in question the ruling of the *nisi prius* court in admitting certain evidence, in giving, refusing and modifying certain instructions, and the sufficiency of the evidence to sustain the verdict.

The case, as presented, is to a degree unusual in its character, and we have had some difficulty in determining the principles which should be applied to it, owing to the form in which the action is brought.

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It will be observed that in both paragraphs the making of the contract is averred, and that "under said contract" the plaintiff proceeded to construct the abutments to the approval of the defendant's engineer.

The *gravamen* of the action is to recover on the executed contract the stipulated price of the work specified therein, and for extra work not embraced in the contract, in addition to which damages are claimed for certain specified breaches of the contract.

The appellant insists that the plaintiff's right of recovery, he having completed the work, as it is alleged in his complaint, under the contract, is limited to the contract price, and that because he proceeded under the contract to the completion of the work, he can recover no damages which may have resulted from the delay occasioned by the default of the railroad company. In support of this contention *Bush v. Chapman*, 2 Greene, Iowa, 549, and *Western Union R. R. Co. v. Smith*, 75 Ill. 496, are relied on.

The case first cited was an action on a special contract, by which it was agreed that Chapman should do the millwright work in the construction of a flouring-mill for Bush. The latter was to furnish all the material, and Chapman was to do all the work, and have the mill ready for grinding by the first day of the ensuing October, in consideration of which he was to be paid a certain price in stipulated payments. It was averred that the plaintiff was ready and willing to perform the work according to the agreement; that the defendant failed to furnish materials, so as to enable him to complete the work at the time agreed upon, but that the plaintiff nevertheless did complete it by the first day of February, of the year following. The declaration proceeds to specify the manner of the failure, and the injury sustained thereby, and claimed damages. The court said: "By asserting the binding effect of the special contract, claiming the benefit of it, and making it the *gravamen* of his action, he" (plaintiff) "is precluded from the recovery of any damages for delay," etc.

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The case is decided upon the authority of *Shaw v. The Turnpike*, 3 Pa. 445. This last case proceeds upon the theory that a party to a special contract may not silently treat it as subsisting until the work contracted for is completed, and then attempt to recover upon a *quantum meruit*. The case of *Western Union R. R. Co. v. Smith*, *supra*, was an action by a contractor for the building of a section of railway to recover damages on account of the failure of the railroad company to furnish material seasonably, so that the completion of the work contracted for was extended into the winter season, and the work was thereby rendered more difficult and expensive. In the course of the opinion in that case it was said: "When the company failed to furnish the iron necessary to complete the work within the time limited, appellee had the right to abandon the contract and refuse to proceed further. * * * If appellee simply resumed track laying as soon as the company obtained iron, without any further arrangement or understanding, the reasonable presumption would be that he was intending to perform the labor under the agreement." It was held that the contract provided the measure of compensation, and that extra compensation could not be recovered because the execution of the work was rendered more expensive by the delay of the employer. It may be doubted, however, whether the authority of the case last cited is not impaired by the later case of *Tobey v. Price*, 75 Ill. 645.

Yielding our assent to the cases cited so far as they hold that a contractor, who proceeds without explicit notice or a new agreement, to the completion of work specially contracted for, will be presumed to have done so under the special contract, we are nevertheless of opinion that where the execution of such contract is dependent upon something essential, which is to be performed by the employer, the default of the employer, resulting in damages to the contractor, may render the former liable for such damages, notwithstanding the latter has not abandoned the contract. While it is true, the contract is to be regarded as furnishing the exclu-

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sive measure of compensation for the work done, the actual damages which have certainly resulted from the default of the employer, should not fall on the contractor. If it were otherwise, a contractor might invest the whole of his available means in necessary initial preparations to perform his contract, and then by the fault of the employer be compelled to accept the alternative of abandoning the contract or waiving any claim for damages.

There is no rule of law which requires the infliction of such injustice. Where a contractor in good faith enters upon the performance of a contract, and incurs expense, the employer having notice of that fact, if the employer, either by an order or by negligently failing to perform an essential part to be performed by him, suspends the execution of the contract, upon a resumption and completion of the work it will be implied that all loss, necessarily occasioned by such suspension, of which the employer is at the time notified, shall fall upon him. The contractor may not acquiesce in the suspension in silence, and upon the resumption and completion of the work claim the contract price, and damages for that which may have occurred with his acquiescence. If, however, notice be given of his readiness and willingness to prosecute the work to completion within the time agreed upon, and that its suspension will involve him in loss, we can discover no principle upon which it can be held that the loss must fall upon the contractor in case of a voluntary resumption of the contract. That it does not is maintained by the following authorities: *Tobey v. Price*, 75 Ill. 645; *Figh v. United States*, 8 Ct. Cl. 319; *Harvey v. United States*, 8 Ct. Cl. 501; *United States v. Behan*, 110 U. S. 338; *United States v. Speed*, 8 Wall. 77; *Koon v. Greenman*, 7 Wend. 121; *Merrill v. Ithaca, etc., R. R. Co.*, 16 Wend. 586; *Railroad Co. v. Howard*, 13 Howard, 307, 344.

The case of *Harvey v. United States*, *supra*, arose out of a claim filed against the government for the suspension of work on a contract for the erection of bridge piers for the Rock

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Island bridge. Under the contract it became the duty of the government to determine the location of the bridge and adopt a general plan for its erection. The work was suspended by reason of the failure of the officer entrusted with its supervision to determine the location and furnish plans. It was held that this furnished no excuse for delaying the contractors in the prosecution of the work they had undertaken. It was there declared that the rule of damages was the same, *pro tanto*, as in cases where the defendants wrongfully put an end to the fulfilment of the contract, viz., the direct and actual loss which the contractor sustained.

With this statement of general principles, we may now consider the case before us.

The contract embraced the construction of work of such magnitude, within a time so limited, as that it became the duty of the plaintiff to employ such means as would reasonably accomplish the work within the time limited. It may have been that to a considerable extent energetic action and vigorous prosecution of the work were depended upon largely to secure profits from the contract. That the work might not be retarded the defendant owed the reciprocal duty of preparing the foundations upon which the abutments were to rest, with due diligence.

The evidence tends to show that the plaintiff, within a few days after the execution of the special contract, took the initiatory steps to execute the work. He proceeded with a force of about forty stonecutters, quarrymen, etc., to quarry and shape the stone to suit the specifications as furnished him. He procured and put in place soon after, the necessary derricks, ropes, guys and other appliances necessary for the construction of the piers.

The evidence tends to show that by corresponding diligence the defendant might have prepared the foundations within a period of twenty or thirty days from the date of the contract. Neglecting its opportunity, an oncoming freshet delayed the foundation for a twelve month or more.

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Having, as the evidence tended to show, expended from six thousand to eight thousand dollars in preparing material, ready to be laid in the piers, the plaintiff, on the 26th day of November, 1881, six days after the time limited for the completion of the contract, gave the defendant's superintendent substantially the following written notice:

"SIR: The time fixed upon in my contract with the Louisville and Nashville Railroad Company, for the erection of two T abutments on Pigeon creek, in the city of Evansville, has now expired, and the abutments are not completed. My failure to complete them in time is caused by the railroad company failing to perform its part of the contract, in this, failing to prepare the foundations in time to allow the completion of the masonry, neither of the foundations being yet ready. I have now quarried and cut at the quarries, near Cannelton, and have had for forty days past, some twenty-two hundred yards of stone, prepared especially for the abutments. I also have had for some time piled under derrick at bridge site, a sufficient amount of stone to have commenced work, but have been compelled to delay for the reason given. As the material is out and ready, and derricks are up at bridge site, block and tackle being damaged by being out in the weather, I ask for an estimate of six thousand dollars on material, so as to enable me to pay indebtedness incurred in procuring material. I also ask a modification of the contract, so as to give me additional estimates on material at bridge site from time to time, sufficient, with amount asked above, to make seventy-five per cent. value of material placed there."

To this the defendant by its superintendent responded, in substance, that the company could not possibly allow estimates on material not in its possession, saying further, that if plaintiff would deliver stone at bridge site, the company would advance money on it.

Thus encouraged, the plaintiff, at great additional expense, procured a large quantity of stone to be freighted from Can-

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nelton, a distance of some eighty miles. The evidence tended to show that he then had invested in stone, freightage, etc., between nine and ten thousand dollars. Some time in January he was allowed an estimate of twenty-eight hundred dollars. The company declined to make any further advances, except as the stone was laid and measured in the piers according to contract.

The foundations were not ready until the 20th of September, 1882. On that day work was resumed.

The plaintiff was permitted, over the defendant's objection, to show the cost of transporting the stone from the quarries to the bridge site, and in this state of the case, the court instructed the jury, in substance, that if they found from the evidence that the plaintiff, in good faith, proceeded after the execution of the contract, to get out stone, and to perform his part of the contract, and was ready and able to have constructed the piers according to the contract, if the foundations had been prepared in time, and that the foundations were not prepared until after the 20th of November, 1881, then the plaintiff was entitled to recover as damages, interest at the rate of six per cent. on the amount actually invested by him in getting out stone and preparing to perform the contract, for such time as he was delayed by the failure of the defendant. The admission of the evidence and the giving this instruction are complained of.

Within the principles already stated, the defendant had no reason to complain of the rulings of the court in respect of either the evidence or the instruction. The defendant having been notified of the exact situation in which the plaintiff was placed, the loss on his investment having been occasioned, as the instruction assumes, by the default of the defendant, it could not reasonably require him to carry the material and expense of preparing it without compensation.

We have found no case in all its features identical with this; nor do we know of any formulated rule applicable for the measurement of damages in an analogous case. The law aims

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to compensate for actual loss. We can not think that the allowance of six per cent. interest on the money actually invested during the time the work was suspended by the defendant, is an unreasonable compensation.

Whether the amount allowed by the jury as interest was correct or not depends upon the computation made by them. As there is nothing in the record indicating the amount thus allowed, and nothing from which we can say the computation was wrong, we must assume that whatever sum was allowed as interest was correct.

The court admitted evidence tending to show that after the stone had been prepared with which to construct the piers according to the specifications originally adopted, the plan was changed by the defendant, and that the change involved expense to the contractor in re-shaping some of the stone according to the new specifications.

This was objected to, and it is now claimed that the proof showing the cost of re-cutting stone rendered necessary by the change is a variance from the claim made in the second paragraph of the complaint.

This evidence was admissible. It is averred that by reason of the shortening of the stems of the abutments, after the stone had been prepared, the stone had to be "chipped off," to the plaintiff's damage. This averment was sufficiently definite to admit the evidence in respect of re-cutting the stone.

By the third instruction the jury were told, in substance, that if changes in one of the piers became necessary by reason of a mistake of the defendant's engineer, the cost of making such change, if it was made by the plaintiff, might be recovered by him. It is contended that this instruction was outside of the case as made by the complaint. This is not maintained by the record. It is averred in the second paragraph of the complaint, that by reason of "changes made in the construction of said abutments, the same was finally completed of a height eighteen inches less than required by the

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plans and specifications," involving an additional expense to the plaintiff.

This averment is uncertain. It does not appear whether the changes were made by mistake, or, if by mistake, whether it was the fault of the plaintiff or defendant. On motion it doubtless would have been required that the plaintiff should make it certain. No motion was made. The defendant can not now complain if the plaintiff made it certain by proof. It can not be said to be a variance such as could have misled the defendant. It is only where the evidence shows a state of facts different from that averred in the complaint that a fatal variance may be claimed. *City of Huntington v. Mendenhall*, 73 Ind. 460.

Evidence was admitted tending to show damages to the plaintiff's derricks, ropes, guys, etc. There was also evidence tending to show that after the plaintiff resumed work, he was delayed to his injury by the failure of the defendant to furnish cars as the contract required, in order to transport stone. It appeared that the plaintiff gave notice that his workmen were being delayed on account of the failure to furnish cars, and that he made repeated requests of the defendant for cars. Under such circumstances the damages resulting were a proper subject for the consideration of the jury.

As has been suggested by counsel, the evidence in the record is voluminous, and it might be difficult for us to determine after the most careful study of it, whether it warranted the jury in reaching the amount of damages assessed. Whether the amount of damages assessed upon the whole case was correct or not, depends upon the weight of the evidence. As there was evidence properly admitted which, if believed, sustains the assessment returned, we can not disturb the finding.

Finally, it is claimed that error intervened by the refusal of the court to instruct, upon the defendant's request, that if the railroad company did not have the foundations for the abutments completed by the 20th day of November, 1881,

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and the plaintiff did not have the stone at the site of the abutments at that time, he was under no obligation to hold himself in readiness to do the work, and that unless the jury believed that a new agreement between the parties was afterwards made, the plaintiff was not entitled to recover damages for the delay occasioned by the failure of the defendant to construct the foundations for the abutments.

Within the principles already referred to, this instruction was not a correct statement of the law, and it was not error to refuse it.

In a case like this, where work has been done under a special contract, the contract price furnishes the measure of compensation for the work. The plaintiff may also recover as damages any direct loss which he sustained by the unreasonable suspension or delay of the work by the employer. The employer must have had notice that the suspension would result in loss, and the suspension must not have been consented to by the contractor. *Doolittle v. McCullough*, 12 Ohio St. 360.

These principles seem to have been applied to the case by the *nisi prius* court.

The judgment is affirmed, with costs.

Filed Feb. 18, 1886; petition for a rehearing overruled April 22, 1886.

No. 11,378.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY v. ADAMS.

COMPLAINT.—*Railroad.—Negligence.—Motion to Make More Certain.*—Where the complaint in an action against a railroad company for personal injury to plaintiff while in its employ, resulting from the alleged negligence of the defendant and its employees, charges that the plaintiff was ordered to perform certain hazardous work with which he was unacquainted, by "his superior in rank in the service" of such defendant,

105	151
124	279
124	327
124	451
105	151
122	206
122	417
129	331
105	151
120	326
130	497
105	151
131	265
131	326
132	113
132	201
105	151
134	162
134	236
134	471
134	591
134	639
136	192
136	402
136	467
105	151
138	131
139	149
139	388
105	151
140	525
140	652
141	644

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Adams.

whereby, etc., the same is not sufficiently specific, and a motion to require the plaintiff to make his complaint more certain, so as to show the position in the defendant's service, and the relation to both defendant and plaintiff, occupied by the persons alleged to have given such orders to him, should be sustained.

SPECIAL VERDICT.—A special verdict should be limited to the case as made by the pleadings, should find all the facts proven under the issues, and should not embody or state conclusions of law.

SAME.—*Conclusions of Law, etc.*—*Venire De Novo.*—If a special verdict include findings of evidence, conclusions of law and matters outside the issues, such findings will be disregarded; still, if such verdict, stripped of such superfluities, is yet sufficient to lead up to and support a judgment either way under the issues, a motion for a *venire de novo* will be overruled.

MASTER AND SERVANT.—*Contract of Hiring.*—*Implied Undertaking of Master.*

—*Co-employee.*—*Vice-Principal.*—As a general rule, in the contract of hiring, there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery and appliances for conducting the business safely, and that he will use all reasonable care to furnish competent and prudent co-employees; and when the master has kept and performed this implied undertaking, the servant can not recover from him for injuries resulting from the business, or the negligence of such co-employees, however dangerous the business; and this rule obtains, regardless of the fact that one employee may be the superior in rank to others in the same general employment, unless he occupies the position of vice-principal.

SAME.—*Implied Undertaking on Part of Servant.*—In such contract of hiring, there is an implied undertaking on the part of the servant that he will exercise reasonable care to avoid injury, and that he assumes all ordinary risks, incident to the business, and all risks from the negligence of co-employees.

SAME.—*Minors.*—These general rules apply to minors.

SAME.—*Master's Liability where Servant is Ordered to do Hazardous Work Outside of Contract.*—The servant's implied assumption of risks, which accompanies and is a part of the contract of hiring, is confined to the particular work and class of work for which he is employed, and if the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it can not be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employees.

SAME.—If, however, the servant, voluntarily and without directions from the master, goes into hazardous work outside of his contract of hiring,

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144 406
145 558
146 483
146 488
146 566
105 151
148 463

105 151
154 686

105 151
150 87

05 151
61 402
61 403

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64 515
64 547

105 151
165 111

05 151
69 447
69 676

105 151
d171 401
171 404

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he puts himself beyond the protection of the master's implied undertaking.

SAME.—*Defective Machinery, etc.—Knowledge.—Diligence.*—If the servant claim damages from the master for injuries received on account of defective premises, buildings, machinery or appliances, he must allege and prove that the defect or the unfitness, which caused the injury, was known to the master, or was such as with reasonable diligence and attention to his business he ought to have known.

SAME.—*Latent Defects and Dangers.*—In all cases the master is bound to disclose to the servant latent defects and dangers, of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care.

SAME.—*Implied Representations of Servant.—Railroad.*—When a person of apparently sufficient age, physical ability and mental caliber to perform the service, seeks an employment at the hands of a railway company, or other master, he will be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence.

SAME.—*Hazardous Work.—Orders by Co-employee.*—If a servant, upon the orders of a co-employee, employed in the same work with him, and without authority from the master to order and control the servant's work and movements, leaves his work which in the original contract he is hired to perform, and engages in hazardous work, he can not make the master respond in damages for the consequences.

SAME.—*Contributory Negligence.*—In no case will the master be held as upon a warranty against the negligence of the servant who brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence.

From the Miami Circuit Court.

N. O. Ross, for appellant.

J. L. Farrar, J. Farrar, W. C. Farrar, A. C. Harris and *W. H. Calkins*, for appellee.

ZOLLARS, J.—Appellee brought this action to recover damages resulting from a personal injury received upon appellant's road. The following, partly a summary, and partly a copy, is as much of the complaint as needs to be set out, viz.:

In 1881, appellee, then under twenty-one years of age, was in the employ of appellant as a section hand, and in no other or

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different capacity. While thus employed, he was "ordered by Patrick Clary, a person standing towards plaintiff in the relation of superior in the employ of defendant," to get upon and go with a construction train, and perform such service as might be required of him. The construction train was sent out for the purpose of gathering up iron along the track. "In obedience to said order, though totally unacquainted with the business of coupling cars, braking, or the general method or order of running trains, * * except as a section hand," appellee went upon the train. There were not upon the train the usual and necessary number of brakemen to manage and control it. While upon the train, appellee was "ordered by said Patrick Clary, his superior in authority in defendant's employ as aforesaid, to act as brakeman at the rear end of the train, a business for which he was not hired, and of and about which he knew nothing." He obeyed the order, and while so acting as brakeman it became necessary to couple other cars to the rear end of the train. Being at the rear end of the train, and after it was upon a side-track to let other trains pass, he "was ordered by Thomas Courtney, in the employ of defendant, and standing toward plaintiff in the relation of superior, to do said coupling. While performing said coupling as ordered by his said superior in service, and as in duty bound to do, without fault or negligence on his part, the bottom of plaintiff's pantaloons upon his right leg was pierced by a sharp piece of iron negligently left by defendant projecting from the rail of defendant's said road, which defendant at said place had negligently and carelessly suffered to get and remain out of repair; said iron, after passing through the leg of plaintiff's pantaloons, entered the shoe upon plaintiff's right foot and held him fast, and before he could extricate his * * foot, and without fault or negligence upon his part, the wheels of the train and cars he was coupling ran upon and over the said right foot of plaintiff, crushing, mangling and bruising said foot and the ankle, rendering amputation necessary," etc.

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The foregoing statement is an abbreviation of the second paragraph of the complaint. The first paragraph is substantially the same, except that the coupling is alleged to have been a duty resulting from the position of brakeman, and there is no averment that appellee received specific orders from any one to make the coupling.

Appellant moved for a rule upon appellee to make his complaint more specific and certain, so as to show the position in its service, and the relation to it and to appellee, occupied by Clary and Courtney, the persons alleged to have given the orders to appellee. We shall see during the course of this opinion that this motion should have been sustained.

It is assigned as error that the court below erred in overruling appellant's demurrer to the complaint.

The contention on the part of appellant's counsel, amongst other things, is, that it is not alleged that appellant knew, or with reasonable care might have known, of the unsafe condition of the rail, and that it is not alleged that appellee did not know, or with reasonable care might not have known, that the rail was in an unsafe condition. Upon the hypothesis that the gravamen of the action is alone the negligence of appellant in connection with the rail, and that to constitute negligence in that regard it is essential that appellant knew, or with reasonable care might have known, of its unsafe condition, still, the general averment that appellant negligently left the sliver or splint projecting from the rail, is sufficient under many decisions of this court. *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160, and cases there cited. And so, too, in relation to the general averment that appellee was without fault or negligence.

Whether or not these former rulings are in entire consonance with the provisions of the code upon the subject of pleading we need not now inquire. They have been so long adhered to as to become the settled law of the State.

The jury returned the following special verdict, upon which

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judgment for \$7,000 was rendered against appellant and in favor of appellee, viz.:

"The defendant, the Pittsburgh, Cincinnati and St. Louis Railway Company, was, on the 9th day of June, 1881, and long previous thereto, a corporation organized and doing business under the laws of the State of Indiana, and operating a line of railroad through the counties of Grant and Miami in said State of Indiana.

"2. That, on June 9th, 1881, plaintiff was a minor under the age of twenty-one years, over the age of twenty years, and was employed by the defendant as a section hand to work repairing the track of defendant's said railroad.

"3. Plaintiff was so employed to work for defendant without the consent of his mother.

"4. When plaintiff was so hired to work as a section hand on defendant's road, his father was not living.

"5. On June 9th, 1881, plaintiff was ordered by defendant's section boss having charge of the section from Bunker Hill to McGrawsville, one Patrick Clary, to go upon defendant's construction train at Bunker Hill, Indiana, and plaintiff did go upon said train as ordered.

"6. Plaintiff went from Bunker Hill on said day, under direction of defendant's agents and employees, to Upland, in Grant county, Indiana.

"7. Plaintiff, previous to June 9th, 1881, had never performed the duties of brakeman, and he had never coupled cars attached to an engine.

"8. Plaintiff, while so on said train at Upland, on June 9th, 1881, was ordered by defendant's agent and plaintiff's superior in authority, to go to the rear of said construction train and act as brakeman thereon, and plaintiff obeyed said order.

"9. While so on the rear end of said train as brakeman, it was plaintiff's duty to couple cars of said construction train on which he was working.

"10. Plaintiff was ordered while at Upland by an agent

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of defendant, and a superior in authority to plaintiff, to couple some cars to said construction train. He attempted to couple said cars, and while so attempting to couple said cars he was injured by the cars of said construction train, and his right leg was so badly crushed that amputation became and was necessary.

"11. At Upland, on said June 9th, 1881, while so attempting to couple cars on said train upon which plaintiff was working, and when he received said injury, he was, when so injured, exercising reasonable care in coupling said cars.

"12. That plaintiff, on said day, while so as aforesaid attempting to couple said cars, exercised such care as might reasonably have been expected of him, considering his youth and inexperience.

"13. While so attempting to couple said cars at Upland, on said 9th day of June, 1881, plaintiff's foot was caught by an iron sliver or splinter on one of the rails of defendant's switch, and held there until struck by the car wheel of said construction train, and his leg was then and there run over by said car wheel and crushed, so that amputation became and was necessary, and plaintiff thereby lost his right leg.

"14. We further find, that while the train upon which plaintiff was ordered by defendant to go, and did go to Upland, was standing upon the side-track, a part of defendant's railway at Upland, in Grant county, Indiana, on June 9th, 1881, the plaintiff was ordered, by an employee of defendant and superior to plaintiff in authority on said railway, to make the coupling of certain cars attached to the locomotive of the train on which plaintiff was working; that in attempting to obey said order to couple said cars, without fault or negligence on his part, the said cars ran upon and over his right leg, and so injured the same that amputation became necessary; and we further find that the defendant was on the cars and train upon which plaintiff was working at said time at Upland when he so lost his leg, in the person of Andrew Mertens, supervisor of and on said road. We do further find,

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that at the time plaintiff was ordered to go on defendant's construction train at Bunker Hill, on June 9th, 1881, he was under the age of twenty-one years and over twenty years; that he had no experience whatever in railroading, except as a section hand; that defendant ordered him to couple cars at Upland on said day, and that he did make the attempt as ordered, and, without fault on his part, was injured and lost his leg thereby, and that neither defendant nor any one of her employees had explained, or did explain, to plaintiff, or caution him of the hazard or danger incident to braking on said train or coupling cars, and that neither the defendant nor any one of her employees had explained to plaintiff, or instructed him how to avoid, the danger incident to such business.

"15. We find that the defendant was careless and negligent in allowing said sliver or splinter to remain upon and protrude from said rail on said switch.

"16. We further find that said defendant ran said train from Bunker Hill to Upland without brakemen, and that it was negligent in so running said train from Bunker Hill to Upland without any brakemen.

"17. The supervisor of defendant's road, who had charge on said day of all of defendant's road from Logansport to Hartford City, was on said construction train in charge of the hands thereon, and directed that plaintiff be ordered to the rear of the train to act as brakeman and couple cars on said train.

"18. Plaintiff had never, previous to June 9th, 1881, had any experience in railroading, except as a section hand on defendant's road and in work on the track.

"19. That said plaintiff was, by said injury so received, made lame, sick and sore, and suffered by reason of said injury great distress of mind and body, and the loss of his leg, permanently injuring him.

"20. That said injury was caused by the wrongful act of said defendant.

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"21. We find that it was negligence on the part of the defendant to order an inexperienced person to perform the duties of brakeman, and couple cars, without first giving him proper instructions.

"22. That plaintiff is damaged by the pain, suffering and mental anguish endured, and the loss of his leg as aforesaid, in the sum of seven thousand dollars.

"23. If, upon these facts, the law is with the plaintiff, we find for the plaintiff and assess his damages at seven thousand dollars. If the law is with the defendant, then we find for the defendant."

Upon the return of the verdict, and before the jury were discharged, appellant filed the following motion:

"The defendant asks the court to direct the jury to make more perfect their verdict in the following particulars:

"1. That they make the second finding more perfect by finding whether the defendant had or had not notice of the plaintiff's minority, and of his mother's objection to his working on the railroad.

"2. That the eighth finding be made more definite by finding the name and position of the defendant's agent who ordered the plaintiff to go to the rear end of the construction train and act as brakeman thereon.

"3. That the tenth finding be made more perfect and definite by finding the name and position of the agent of the defendant who ordered the plaintiff to couple cars to the construction train.

"4. That the eleventh finding be made more perfect and definite by finding what care the plaintiff exercised in coupling said cars.

"5. That the twelfth finding be made more perfect and definite by finding what care the plaintiff exercised in attempting to make said coupling.

"6. That the fourteenth finding be made more perfect and definite by finding the name of the person, and the position he occupied in defendant's service, who ordered the plaintiff

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to make the coupling of certain cars standing on said switch to other cars attached to the locomotive of the train upon which the plaintiff was working, and that they find the position occupied by Andrew Mertens.

"7. That the twentieth finding be made more perfect and definite by finding what the wrongful acts of the defendant were that caused the injury."

That motion having been overruled, appellant moved for a *venire de novo*. This motion was also overruled. We think that the court below clearly erred in overruling these motions.

The statute provides in relation to verdicts as follows: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court." R. S. 1881, section 545.

The purpose of a special verdict is to avoid the mistakes that the jury may make in the application of the law to the facts. When a special verdict is demanded, the jury are to find the facts, and the court declares the law upon those facts; and hence it is well settled that a special verdict should be limited to the case as made by the pleadings, should find all the facts proven under the issues, and should not embody or state conclusions of law. If a special verdict includes findings of evidence, conclusions of law and matters without the issues, such findings will be disregarded in the determination and rendition of the judgment. If stripped of these matters, the verdict is yet sufficient to lead up to and support a judgment either way under the issues as made by the pleadings, a motion for a *venire de novo* will be overruled. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and cases there cited; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Dixon v. Duke*, 85 Ind. 434; *Louisville, etc., R. W. Co. v. Balch, ante*, p. 93; *Hasselman v. Carroll*, 102 Ind. 153.

As appellee's mother is not prosecuting this action, we can

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not see how it is of any importance whether appellee was employed by appellant with or without her consent. The third and fourth findings, therefore, may be disregarded.

In the eleventh and fourteenth findings, it is stated that appellee received the injury without fault or negligence on his part.

In the twelfth finding, it is stated that appellee exercised such care as might reasonably have been expected of him, considering his youth and inexperience.

The fifteenth finding is, that appellant was careless and negligent in allowing the sliver or splint to remain and protrude from the rail.

In the sixteenth finding, it is stated that appellant was guilty of negligence in running the train without brakemen.

The twentieth finding is, that the injury was caused by the wrongful act of appellant.

The twenty-first finding is, that it was negligence on the part of appellant to order an inexperienced person to perform the duties of brakeman and to couple cars, without first giving him proper instructions.

In each and all of these findings in relation to wrong and negligence on the part of appellant, the jury, instead of returning the facts and leaving it for the court to pronounce the law upon those facts, returned conclusions which embody conclusions of law. This they had no right to do, and hence all such conclusions must be disregarded; and hence there is nothing properly in the verdict showing that appellant was in any way guilty of wrong or negligence as connected with the defective rail, or that it was guilty of any other wrong or negligence to the injury of appellee, unless other portions of the verdict show wrong and negligence upon its part in ordering him from the work for which he was employed, to a different and more hazardous work. That is a question we shall hereafter consider.

Commencing with the decision of the English court in the
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case of *Priestley v. Fowler*, 3 M. & W. 1, in 1837, the decision of the Supreme Court of South Carolina in the case of *Murray v. Railroad Co.*, 1 McMullan, 385, in 1841, and the decision of the Supreme Court of Massachusetts in the case of *Farwell v. Boston, etc., R. R. Corp.*, 4 Met. 49, in 1842, it has become the settled law in England, Scotland and Ireland, and the States of this Union, with scarcely an exception, that, as a general rule, in the contract of hiring, there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery, and appliances for conducting the business safely, and that he will use all reasonable care to furnish competent and prudent co-employees. The master, by the contract of hiring, does not become an insurer against injury to the servant. On the other hand, in the contract of hiring, there is an implied undertaking upon the part of the servant that he will exercise reasonable care to avoid injury, and that he assumes all ordinary risks incident to the business, and all risks from the negligence of his co-employees. When the master has kept and performed his implied undertaking, the servant can not recover from him for injuries resulting from the business, or the negligence of such co-employees, however dangerous the business may be.

This general rule has been modified by statute in some of the States, but not in this State. The rule obtains, regardless of the fact that one employee may be the superior in rank to others in the same general undertaking or employment, unless he occupies the place of vice-principal. *Pierce R. R.* 358, and cases there cited; *Wood Master and Servant*, sections 326, 416, 425, and cases there cited; *Madison, etc., R. R. Co. v. Bacon*, 6 Ind. 205; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440 (41 Am. R. 552); *Robertson v. Terre Haute, etc., R. R. Co.*, 78 Ind. 77; *Umback v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Louisville, etc., R. R. Co. v. Orr*, 84 Ind. 50; *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282; *Indiana Car Co. v.*

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Parker, 100 Ind. 181; *Atlas Engine Works v. Randall*, 100 Ind. 293 (50 Am. R. 798); *Indianapolis, etc., R. W. Co. v. Johnson*, 102 Ind. 352; *Capper v. Louisville, etc., R. W. Co.*, 103 Ind. 305.

The above general rule applies to minors. *Pierce R. R.* 360, and cases there cited; *Wood Master and Servant*, section 368, p. 744, and cases there cited; *Thompson Neg.* 977, and cases there cited; *Ohio, etc., R. R. Co. v. Hammersley*, 28 Ind. 371; *Sullivan v. Toledo, etc., R. W. Co.*, 58 Ind. 26; *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Atlas Engine Works v. Randall, supra*; *Brazil, etc., Coal Co. v. Cain, supra*. Out of this general rule has come the more specific one, that if the servant claims damages from the master for injuries received on account of defective premises, buildings, machinery or appliances, he must allege and prove that the unfitness or the defect, which caused the injury, was known to the master, or was such as, with reasonable diligence and attention to his business, he ought to have known. If the case before us is to rest alone upon the alleged negligence of appellant as connected with the alleged defective rail, then it must be shown that the rail was so defective when put in place by appellant, or, if it afterwards became worn and defective, that appellant knew of the defective and dangerous condition, or that it was defective and dangerous for such a length of time that appellant might and ought to have known of it by the exercise of reasonable attention, care and diligence. *Thompson Neg.*, p. 971; *Wood Master and Servant*, sections 368, 414, and cases there cited; *Atchison, etc., R. R. Co. v. Wagner*, 33 Kan. 660 (21 C. L. J. 51); *Schooner "Norway" v. Jensen*, 52 Ill. 373; *Indianapolis, etc., R. R. Co. v. Love*, 10 Ind. 554.

If the jury had found as a matter of fact, that appellant put down a defective and dangerous rail, or that it had actual knowledge of the defective rail, or had found and stated the length of time that it had been defective, and such other facts, if any, as surrounded the case, their verdict would have been a verdict of facts, and the court might then have de-

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clared upon the facts, as a matter of law, that appellant was or was not guilty of negligence as connected with the rail. No such facts are stated in the special verdict, and hence there is nothing in that verdict to show that appellant was guilty of negligence in allowing the alleged defective rail to remain in use upon the road-bed. It is apparent that the jury meant to find that appellant was thus guilty of negligence, but they returned legal conclusions instead of the facts. The verdict is, therefore, defective upon its face, and so defective that judgment can not be rendered upon it, if, as stated, the case is to rest alone upon the alleged negligence of appellant in allowing the defective rail to remain in use.

Appellee contends, however, that when injured he was not engaged in the work for which he was hired; that he was a minor, without experience in braking, operating trains and coupling cars; that he was wrongfully taken from the work for which he was engaged, and ordered by appellant to a more hazardous work, and that, therefore, the above general rule does not obtain, and that appellant is liable regardless of the fact as to whether or not it knew, or with reasonable care might have known, of the defective rail.

The above general rule is not without its exceptions, modifications and limitations.

The servant's implied assumption of risks is confined to the particular work and class of work for which he is employed. There is no implied undertaking, except as it accompanies and is a part of the contract of hiring between the parties. When the servant voluntarily, and without directions from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking, and if he is injured he must suffer the consequences. On the other hand, if the servant, by the orders of the master, is carried beyond the contract of hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the

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general business, where the work is of such a different nature and character that it can not be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employees. He will not necessarily be guilty of negligence in obeying such orders of the master, even though they may carry him into more hazardous and dangerous work. Whether or not the servant may be negligent in obeying such orders, will depend upon the facts and circumstances of each particular case. The facts and circumstances may be such as to show that in obeying such orders the servant voluntarily assumed the increased risks; or they may be such as to show that he obeyed the orders for a temporary change, under threats of discharge, or under such circumstances as that he might well have expected a discharge if he disobeyed.

In all cases the master is bound to disclose to the servant latent defects and dangers of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care. This is particularly so when the master employs, for a hazardous and dangerous work, a child, young person, or other person without experience, and of immature judgment. In such a case, the master is bound to point out the dangers of which he has, or ought to have, knowledge, and give to the employee such instructions as will enable him to avoid injury by the exercise of reasonable care, unless both the danger and the means of avoiding it are apparent, and within the comprehension of the servant. A neglect of such duties may, in a proper case, the servant being without contributory negligence, render the master liable, regardless of the fact that he may have exercised reasonable care in making and keeping the premises, machinery and appliances in a safe condition. The person employed may be so

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young, inexperienced and immature in judgment, that no kind of warning and instruction would relieve the master from responsibility for injuries resulting from putting him at a hazardous and dangerous work.

In the cases last above mentioned, the gravamen of the action is the negligence of the master in failing to give the proper warnings and instructions, and in employing a person of such immature years and judgment that such warning and instructions would afford no protection. And hence, in order that the master may be properly charged as being thus negligent, and made liable for resulting injury, it must be made to appear that he knew, or by the exercise of reasonable care and observation might have known, of the inexperience, disqualification and immature judgment of the servant employed. When a person of apparently sufficient age, physical ability and mental caliber to perform the service, seeks an employment at the hands of a railway company, or other master, he ought to be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. In such a case, we know of no good reason or rule of law that will compel the master to pass him through a critical examination to discover his competency for the place, or that will convict the master of negligence for not so doing.

As we have said, when, by the order of the master, the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment. Hence it is, that when a servant is thus, by orders of the master, put at work outside of his employment, and is injured by reason of defective machinery, railroad track, etc., without his fault, the master is liable, regardless of the care he may have exercised to keep the machinery, railroad track, etc., in a safe condition. When a servant is thus ordered to work at a particular place, or with particular machinery, etc., outside of his employment, the

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master impliedly assures him, not only that he has exercised reasonable care to have the place, machinery, etc., in a safe condition, but also that they are in a safe condition and fit for the business for which they are used. This principle, or rule of the law, has been more frequently and more rigorously applied in cases of employees immature in years, judgment and experience.

Here again it should be observed, that the master will not be thus liable, if the circumstances are such as to show that the servant is competent to apprehend the danger, and expressly or impliedly assumes the risk. The following authorities fully support the above ruling: *Atlas Engine Works v. Randall*, *supra*; *Hill v. Gust*, 55 Ind. 45; *Hawkins v. Johnson*, *ante*, p. 29; *Indiana Car Co. v. Parker*, *supra*; *Mann v. Oriental Print Works*, 11 R. I. 152, and Judge Redfield's note thereto, 14 Am. L. Reg. N. S. 728; *Railroad Co. v. Fort*, 17 Wall. 553; *Lalor v. Chicago, etc., R. R. Co.*, 52 Ill. 401; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Chicago, etc., R. W. Co. v. Bayfield*, 37 Mich. 205; *Dowling v. Allen & Co.*, 74 Mo. 13; Wood Master and Servant, sections 349, 350, 352, 439; Beach Con. Neg., section 132; Thompson Neg., pp. 975, 976, section 7; p. 977, section 8; p. 979, section 9; p. 1016, section 21; Pierce R. R. 378.

Thus far we have spoken of orders given to the servant by the master. In most of the cases without this State, above cited, the orders were by persons held to have sustained to the master the relation of vice-principal. We cite those cases in support of the general doctrines here declared. So far as they hold that any particular person, upon any particular evidence, may be regarded as a vice-principal, we express no opinion, either of approval or disapproval at this time. We are not required at this time to decide anything upon those questions, because they are not properly before us.

We turn again to the special verdict. It is very clear that this verdict does not bring appellee's case within the doctrine for which he contends, and the doctrine here declared.

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It is stated in the fifth special finding, that appellee was ordered by appellant's section boss, having charge of a certain section of the road, to go upon a construction train, but it is not shown that this section boss had any authority at all over appellee, or that he was the boss of the section upon which he was employed to work.

It is stated in the eighth special finding, that appellee was ordered by appellant's "agent and plaintiff's superior in authority" to go to the rear of the construction train and act as brakeman.

In the tenth special finding, it is stated that "appellee was ordered by an agent of defendant, and a superior in authority to plaintiff," to couple some cars to the construction train.

In the fourteenth special finding, it is stated that appellee was ordered by "an employee of defendant, and superior to plaintiff in authority on said railway, to make the coupling of certain cars attached to the locomotive of the train on which he was working," and that the "defendant ordered him to couple cars."

We think that the jury should have been returned to their room with instructions to make each and every one of these findings in relation to the persons who gave the orders, more certain and specific, so as to show the nature of their employment, their duties and authority generally, and what control, if any, they were given and had over appellee as a servant of the common master. Whether the purpose of these findings was to show that appellee did not voluntarily leave the work for which he was employed, and voluntarily undertake a more hazardous work, or that appellant was guilty of wrong in thus ordering him to do the hazardous work outside of his employment, or is in any way liable by reason of such orders, it is equally important and essential that the persons who gave the orders should have had authority to bind appellant by such orders. In other words, the orders must have been the orders of the master, appellant. And in order that that should be so, the persons giving the orders

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must, as to such orders, have occupied the position of vice-principal.

If appellee, without any kind of orders by appellant and as a mere volunteer, left the work for which he was employed, and as such volunteer undertook the coupling of cars, he can not hold appellant liable on account of any injuries he may have thus received. And if upon the orders of a co-employee, engaged in the same work with him, and without authority from the master to order and control appellee's work and movements, he left his work and engaged in the hazardous work, he can not make the master respond in damages for the consequences. Wood Master and Servant, sections 425, 450, 451 (p. 889); Thompson Neg., pp. 1016-17; *Felch v. Allen*, 98 Mass. 572; *Brown v. Byroads*, 47 Ind. 435; *Everhart v. Terre Haute, etc., R. R. Co.*, 78 Ind. 292 (41 Am. R. 567).

It does not necessarily follow that because the persons giving the orders stood towards appellee in the relation of superior in the employ of appellant, they had authority, or the semblance of authority, to order him to do the braking and coupling. They may have been superior in rank, and yet without authority, or the semblance of authority, to give such orders. For the reasons stated, also, the court should have sustained appellant's motion for a rule to make the complaint more certain and specific.

If it be said that the special findings last above under consideration amount to statements that the persons giving the orders to appellee occupied the position of vice-principals, then we should have those findings in collision with the rule that the jury, in returning a special verdict, can not embody therein conclusions of law. Whether or not such persons had such authority, or occupied the position of vice-principals, would depend upon their rank in the master's service, their duties and powers, their relation to appellee, and the authority expressly conferred upon them by the master, etc. These are matters of fact.

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The jury should have found and returned the facts. Upon the facts so found it would have been for the court to declare, as a matter of law, whether or not the persons giving the orders were, as to such orders, vice-principals. Rejecting what may be regarded as conclusions of law, the special verdict states nothing to show that appellee left his work and went upon the train by the orders of any one who had authority to direct him and bind appellant by such directions. Here, again, the jury attempted to find that appellee went upon the train under proper orders, but rendered their verdict defective by returning legal conclusions, and not the facts.

The seventeenth finding is, that the supervisor, who had charge of a portion of the road, was upon the train in charge of the hands thereon, and directed that appellee be ordered to the rear of the car to act as brakeman and couple cars. Of this finding it is sufficient to say that there is nothing in the verdict to show that this direction was carried out by any one, or that appellee acted in obedience to it.

Whether the case should be made to rest upon the alleged negligence of appellant, as connected with the defective rail, or upon its alleged wrong or negligence in ordering appellee from the work for which he was employed to the different and more dangerous work of coupling cars, it must appear that he was not guilty of negligence which contributed to his injury. In no case will the master be held, as upon a warranty, against the negligence of the servant, who thereby brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence. If appellee knew of the defective rail, and under all the circumstances, by the exercise of reasonable care, might have avoided the injury, he can not recover. It is not found in the special verdict that he did not know of the defective and dangerous rail, nor that the circumstances were such that he did not comprehend the danger. It is found that he had never performed the duties of brakeman, nor coupled cars, and that he had

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no experience in railroading except working upon the track ; but that might all be, and yet he might have known that to undertake to couple the cars over it, in the manner he did, was dangerous, and would result in injury. The other portions of the verdict, so far as they relate to care on appellee's part, are mere conclusions of law, and must be disregarded.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to sustain appellant's motion for a *venire de novo*, and his motion for a rule upon appellee to make his complaint more certain and specific.

Filed Feb. 10, 1886.

No. 12,627.

PRESSLEY v. LAMB.

RECEIVER.—*Jurisdiction.*—*Judge in Vacation.*—Under the provisions of section 1222, R. S. 1881, a judge in vacation is clothed with the same power and authority relative to the appointment of receivers, as is the court itself when in regular and open session, and his acts, orders and proceedings in such premises are the judicial proceedings of the court whereof he is judge.

SAME.—*Voluntary Appearance of Defendant.*—Where a complaint is filed by one partner, before a judge in vacation, asking the appointment of a receiver, and the defendant, a co-partner, voluntarily appears to such action and files his answer, without process, and submits the same, such judge thereby acquires full and complete jurisdiction both of the subject-matter of the action and the persons of the parties, such voluntary appearance being equivalent to the service of process.

SAME.—*Collateral Attack.*—The regularity or legality of the appointment of a receiver by a judge in vacation, who has acquired jurisdiction of the subject-matter of the action and the parties thereto, can not be questioned collaterally in a subsequent action.

SAME.—*Appeal to Supreme Court.*—Whenever the court or judge, either in term time or vacation, appoints or refuses to appoint a receiver, the party aggrieved may, under the provisions of section 1231, R. S. 1881,

106	171
133	64
106	171
139	471
105	171
145	547
106	171
152	284
106	171
159	20
159	78
105	171
170	582

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within ten days thereafter, appeal from the decision of such court or judge without awaiting the final determination of the case,

MITCHELL, J., dissents.

From the Marion Superior Court.

F. Winter, for appellant.

R. Hill, B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

Howk, J.—This cause is now here for the second time. The opinion and decision of the court, when the case was first here, are reported under the title of *Pressley v. Harrison*, 102 Ind. 14. After the cause was remanded, in obedience to the mandate of this court, the superior court at special term overruled the defendants' demurrers to appellant's complaint theretofore filed. Thereafter the appellant, Pressley, filed a second paragraph of complaint. To the entire complaint the appellee, Lamb, separately answered in two paragraphs; but the first paragraph, being the general denial, was subsequently withdrawn. Appellant demurred to the second paragraph of appellee's answer, upon the ground that it did not state facts sufficient to constitute a defence to his, appellant's, action. This demurrer was overruled by the court at special term, and appellant at the time excepted, and failing and refusing to reply or plead further, the court adjudged that he take nothing by his suit, and that appellee, Lamb, recover his costs herein. Upon appeal this judgment of the court at special term was affirmed by the general term, and from the judgment of the general term appellant, Pressley, now here prosecutes this appeal.

By a proper assignment of error here he has brought before this court the errors assigned by him in general term. By these errors he calls in question the sufficiency of the facts stated in the second paragraph of appellee's answer to constitute a defence to his, appellant's, action, and the decision of the court at special term in overruling his demurrer to such second paragraph of answer.

It does not appear from the record before us, that appel-

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lant's original complaint, or what may now be called the first paragraph of his complaint, has been amended or materially changed since this cause was here before. The important facts stated in such original complaint are given in the opinion of the court in *Pressley v. Harrison, supra*, and need not be repeated here.

In the second paragraph of his complaint the appellant has fully and accurately stated his cause of action, and, before considering the errors of which he complains, it is proper, we think, that we should give the substance of such second paragraph. Appellant alleged in such second paragraph of complaint, that on the 25th day of August, 1884, he recovered a judgment in the Marion Circuit Court, of this State, against the defendants, Alfred and John C. S. Harrison, for \$9,929.02, and costs taxed at ——— dollars, and thereafter, on the same day, caused an execution to be issued on such judgment to the sheriff of Marion county, which execution was then in the hands of such sheriff, wholly unsatisfied; that at the time such judgment was so rendered and such execution issued, and theretofore, on July 18th, 1884, such judgment defendants were the owners of a large amount of personal property, in excess of the amount exempt from execution, consisting of money, office and bank furniture, fire and burglar-proof safes, farming utensils and machinery, hay and other agricultural products, bills, notes, accounts and other choses in action and credits, and other personal property, the character of which was unknown to appellant, and also of a number of lots and parcels of real estate, particularly described, in Marion county, Indiana; that the defendants, Alfred and John C. S. Harrison, on and before the 18th day of July, 1885, were partners in the banking business, under the firm name of "A. & J. C. S. Harrison," and, in that character, had contracted and owed the debt to appellant, for which such judgment was recovered, and were the owners of all the property, real and personal, thereinbefore described, the same being partnership assets, except the

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parcel of real estate, No. 24, the individual property of defendant Alfred Harrison, and except also parcels numbered 25 and 26, which were the individual property of defendant John C. S. Harrison.

Appellant further alleged that on the 18th day of July, 1884, defendants Alfred and John C. S. Harrison suspended payment in their said banking business, and became and were insolvent, as such partners and as individuals ; and being so insolvent, but there being no controversy as between themselves, they agreed between themselves to place all their partnership assets and property, and all their individual property and assets subject to execution, in the hands of a receiver to be appointed by one of the judges of the superior court of Marion county, wherein they both resided, to be administered by such superior court by and through such receiver, and distributed to their creditors under the orders of such court, and thereby to prevent any of their creditors from taking any of such property on execution for the satisfaction of their debts ; and to that end they further agreed that a proceeding, in the form of an ordinary civil action, should be forthwith commenced in such superior court, to which Alfred Harrison should be made an ostensible plaintiff, and John C. S. Harrison an ostensible defendant, and which proceeding, while adversary in form, should in fact be of a friendly and agreed character, and should be prosecuted without any opposition thereto being made by the ostensible defendant, John C. S. Harrison, but, on the contrary, with his active assistance, so that, without any delay, the appointment of a receiver should be procured, in whose hands all the property, partnership and individual, of Alfred and John C. S. Harrison should be placed, and thereby their creditors prevented from taking the same in execution for the satisfaction of their debts.

And appellant averred that in execution of such agreement, defendant John C. S. Harrison personally employed attorneys to commence such proceeding in the name of Alfred Harrison as plaintiff, and against himself as defendant, and

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such attorneys thereupon, under the instructions and directions of John C. S. Harrison, and in the absence of Alfred Harrison, prepared and filed in the office of the clerk of the Marion Superior Court, on the 18th day of July, 1884, a complaint against John C. S. Harrison, as defendant, in the name of Alfred Harrison, as plaintiff, as follows:

"The plaintiff complains of the defendant and says, that plaintiff and defendant are partners doing business as bankers, at Indianapolis, Indiana, under the firm name of 'A. & J. C. S. Harrison,' and have been, as such partners, doing such business for twenty years last past; that 'a run' has been going on, by their depositors, against their said bank for several days last past, whereby their cash resources have been so much reduced that they are unable longer to continue said banking business, and said firm is therefore insolvent; that, in order to prevent a multiplicity of suits and thereby cause great expense in litigation, and in order to save said estate for their creditors, it is important that a receiver be now appointed for said firm to take possession and control of the assets of such firm, and administer the same under the order of the court; that a dissolution of such partnership be had, and an accounting between the partners. Wherefore," etc.

This complaint was signed by the attorneys of the plaintiff therein; and such attorneys, appellant alleged, at the same time and by the procurement of John C. S. Harrison, in further execution of the agreement between him and Alfred Harrison, prepared the answer to such complaint of John C. S. Harrison, signed by him in person, wherein he, "the defendant in this cause, admits the allegations of the complaint herein to be true;" that such answer was filed by John C. S. Harrison in the clerk's office of such superior court, at the time the complaint of Alfred Harrison was filed as aforesaid; and when such complaint and answer were so filed, and at all times thereafter until the first Monday of September, 1884, the superior court of Marion county was in vacation; that no summons or other process, or publication, was ever issued

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or made on such complaint of Alfred Harrison, or served on John C. S. Harrison, nor did he ever endorse on any summons, or other process, an acknowledgment of service in such pretended action; that immediately upon such complaint and answer being so filed, on the 18th day of July, 1884, they were, in further execution of such agreement, presented by the attorneys by whom they had been prepared, and by John C. S. Harrison in person (Alfred Harrison not being personally present, nor represented otherwise than as he was represented by the attorneys, who prepared such complaint and answer by the procurement of John C. S. Harrison), to the Honorable Lewis C. Walker, one of the judges of such superior court, who thereupon made an order placing all the partnership assets of Alfred and John C. S. Harrison in the custody of the sheriff of Marion county, and continued the appointment of a receiver, under advisement, until the next day, the 19th day of July, 1884, on which day, in further execution of their aforesaid agreement, there was filed in the clerk's office of such superior court, and presented to Judge Walker of such court, in vacation, a supplemental complaint in the name of Alfred Harrison as plaintiff, against John C. S. Harrison as defendant, prepared by the aforesaid attorneys by the procurement of John C. S. Harrison, wherein Alfred Harrison alleged that the partnership assets of A. & J. C. S. Harrison were not sufficient to pay the liabilities of such firm; that he was the individual owner of property, real and personal, which he then surrendered, saving only the amount lawfully exempt from execution, and asked the court to take possession thereof by its receiver and apply the same to the payment of the debts of such partnership, and that he was informed and believed that John C. S. Harrison was willing to surrender his individual property for the payment of the debts of such partnership, and he asked that the court direct such receiver to take possession of the individual property of John C. S. Harrison, for the payment of the debts of such partnership, and that such "supplement and amendment be

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taken and treated as part of his original complaint filed herein;" and, on the day last named, John C. S. Harrison in person presented to Judge Lewis C. Walker his answer to such supplement and amendment, in which answer he admitted the allegations of the supplemental complaint of Alfred Harrison, and consented to the surrender of all his individual property, in the manner and for the purposes mentioned in such complaint.

And the appellant averred that no summons or other process or publication was ever issued or made on such pretended supplemental complaint, nor served on John C. S. Harrison, nor was service thereof acknowledged by him, but, after such papers were filed in the clerk's office as aforesaid, they were presented to Judge Lewis C. Walker by such attorneys and by John C. S. Harrison in person (Alfred Harrison not being present in person, nor represented otherwise than as the aforesaid attorneys, who prepared such papers by the procurement of John C. S. Harrison, assumed to represent him), and thereupon Judge Walker on such day, in vacation, without any other or different proceedings or action being had or taken in such matter, than as thereinbefore stated, and acting solely upon such pretended complaint and supplemental complaint and answers thereto, and upon the personal consent and agreement of John C. S. Harrison thereto, and at his instance and procurement, as well as that of Alfred Harrison, as thereinbefore shown, made an order appointing appellee, Robert N. Lamb, receiver of all the assets, partnership and individual, of Alfred and John C. S. Harrison, and directed that, upon his executing bond and taking oath as such receiver, he should immediately take into his exclusive possession and control, and hold and dispose of, under the orders of the court to be thereafter made, all of said partnership and individual property; that appellee Lamb thereupon gave bond and took the oath required of him by such order, to the approval of such judge, and at once, as such

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receiver, took possession of all the partnership and individual assets of Alfred and John C. S. Harrison, and had since retained possession thereof as such receiver, and claimed that his possession was rightful, and that he was entitled to hold and dispose of such property in such manner as the court should direct, in proceedings to be had in such pretended action; and that appellee Lamb, as such receiver, asserted further that the appellant had not, by virtue of his aforesaid judgment and execution against the defendants, Alfred and John C. S. Harrison, acquired any lien upon any of such property so owned by the Harrisons and then in the possession of such receiver, or any right to enforce his judgment by levy upon and sale of any of such property on execution.

Appellant further averred that, on the 19th day of July, 1884, the defendants Alfred and John C. S. Harrison, each for himself as an individual, executed a deed of assignment of all his individual real and personal property to appellee Lamb, under the voluntary assignment law of this State for the benefit of creditors, and such deed was, on the same day, recorded in the recorder's office of Marion county; that appellee Lamb held possession of such property by no other or different authority or right than thereinbefore stated; that Alfred and John C. S. Harrison had not, nor had either of them, any property out of which appellant could procure satisfaction of his judgment, or any part thereof, other than such as was then in the possession of appellee Lamb; and that, by reason thereof, appellant was without remedy for the collection of his judgment, unless the court would decree that the appointment of appellee Lamb as receiver, so made in vacation and by the consent and agreement of defendants, Alfred and John C. S. Harrison, was without jurisdiction, and fraudulent and void, and vested in appellee Lamb no right to the possession of such property, or any part thereof, as against appellant's judgment and execution, and his rights thereunder. Wherefore, etc.

We have given a fuller summary of the facts alleged in

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the second paragraph of the appellant's complaint than we otherwise would have done, for the purpose of demonstrating that the case stated therein, although manifestly relating to and founded upon the same facts and circumstances as the first paragraph, is not the same case which was presented to and considered by this court on the former appeal in *Pressley v. Harrison*, *supra*. So wide and so material is the difference between these two paragraphs of appellant's complaint, as it seems to us, that if issue were joined on either one of such paragraphs, and such issue heard by the chancellor upon the facts stated in the other paragraph as the only evidence in the cause, there could be neither finding nor decree in appellant's favor upon such issue. We have said thus much upon this point, for the purpose of showing that as the case is now presented here, upon the second paragraph of appellant's complaint and appellee's answer, the opinion of this court on the former appeal can not be regarded, in any proper sense, as the "law of the case." *Dodge v. Gaylord*, 53 Ind. 365; *Kress v. State, ex rel.*, 65 Ind. 106; *Board, etc., v. Indianapolis, etc., R. W. Co.*, 89 Ind. 101; *Rinard v. West*, 92 Ind. 359; *Davis v. Krug*, 95 Ind. 1.

The substance of the first paragraph of appellant's complaint is given in our opinion on the former appeal (102 Ind. 14), and, as we have heretofore said, need not be repeated. We may say, however, that the fundamental and controlling question in the minds of the court, presented in and by such paragraph, then the only complaint, and decided by this court, is wholly eliminated and withdrawn from the second paragraph of complaint now under consideration. The question thus presented and decided is stated in the syllabus of our opinion on the former appeal as follows: "The filing and delivery to the judge by the plaintiff of papers purporting to be signed by the defendant can not constitute an appearance by the defendant to the action or to the plaintiff's motion for a receiver." That is, briefly stated, the plaintiff in a suit can not appear for the defendant therein, and by filing and

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delivering to the judge what purports to be, or is in fact, the defendant's answer, give the judge jurisdiction of the person of the defendant. This question, as we have said, is eliminated and withdrawn from appellant's case, as the same is stated in the second paragraph of his complaint. Not only so, but, in such second paragraph, appellant alleged the facts to be that in the suit of Alfred Harrison against John C. S. Harrison, instituted in the Marion Superior Court, wherein the plaintiff made application to Judge Lewis C. Walker, one of the judges of such court, in vacation, for the appointment of a receiver, he appeared and was represented by reputable practicing attorneys of that court and of this court, and that the defendant, John C. S. Harrison, made full appearance *in propria persona*, as he had the right to do, in and to such suit and application. True, appellant has alleged in the second paragraph of complaint that the defendant employed attorneys for the plaintiff in such suit and application; but it is clear, we think, that the authority of the attorneys who appeared for the plaintiff, no matter by whom or how employed, can not be called in question in this collateral suit. Indeed, the authority and right of such attorneys to appear for the plaintiff, in such suit or application, as it seems to us, could not have been directly questioned therein, except, as provided in section 970, R. S. 1881. This not having been done, the authority of such attorneys to appear for such plaintiff must be presumed, and can not be controverted in any collateral suit or proceeding, either below or in this court. *Indiana, etc., R. W. Co. v. Maddy*, 103 Ind. 200.

We have given the substance of the second paragraph of appellant's complaint for another reason. So far as the naked facts of this case are concerned, without any coloring or qualification on either side by adjectives or epithets, there is no substantial difference between the averments of appellee's answer and the allegations of the second paragraph of appellant's complaint, so far as the latter goes. There are some facts stated in the answer, however, and admitted by appel-

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lant to be true, as the case is here presented, which are not to be found in either paragraph of the complaint. These facts were manifestly pleaded by the appellee for the purpose of informing the mind and enlightening the conscience of the chancellor in relation to the present status and surroundings of appellee's receivership. So that, even if there were irregularities, informalities, or, possibly, illegalities, which were not fundamental, in any of the proceedings in the suit wherein appellee was appointed receiver, a court of equity might not, in ignorance of the disastrous complications which would result therefrom, as alleged, revoke, annul or set aside his appointment as such receiver.

To that end, apparently, and in addition to the facts stated in the second paragraph of appellant's complaint, the appellee alleged, in substance, among other things, that for more than thirty years prior to the 18th day of July, 1884, Alfred Harrison and John C. S. Harrison had been engaged in the business of private bankers in the city of Indianapolis, carrying on and conducting a bank of discount and deposit, under the firm name of "A. & J. C. S. Harrison," and had acquired and held in their partnership name and business, for the use and benefit of their firm, a large amount of real estate, personal property, rights, credits and effects, of the value, to wit, of \$100,000, and more; that, on the day last named, A. & J. C. S. Harrison had become and were largely indebted to divers persons, firms and corporations, in the sum, to wit, of \$600,000, and had thereby become hopelessly insolvent; that, in consequence of their indebtedness and embarrassment, they had become and were unable to continue their banking business, as they each well knew, and it became apparent to each of them that, unless steps were immediately taken to place their assets and effects under the control of a competent court, the same would be wasted and lost to a great extent in costs and expenses of litigation, by means whereof only a few of their creditors would receive any part of their claims or debts.

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Appellee then stated in his answer the institution of the suit of *Alfred Harrison v. John C. S. Harrison*, in the Marion Superior Court, on the 18th day of July, 1884, in the vacation of such court, the plaintiff's application therein to Judge Lewis C. Walker, one of the judges of such court, sitting in chambers on the day named and the next day, in vacation, for the appointment of a receiver, the full appearance of both parties on both days before Judge Walker, in his chambers, in such suit and application, the plaintiff by his attorneys therein, and the defendant appearing in his own proper person and acting for himself therein, the proceedings then and there had, and the orders then and there made, by and before Judge Walker, in such suit and application, and in the presence of both the parties thereto appearing as aforesaid, and the appointment of appellee as receiver, his acceptance of the trust and qualification therein, and his taking and holding the possession of the property and assets, partnership and individual, of the parties to such suit; all these facts are stated in the answer substantially as the same are stated in the second paragraph of the complaint, but without coloring or qualification of any kind.

Appellee then alleged in his answer, that he had been sued as such receiver, in the courts of this State and elsewhere, giving the particulars; that he had sold property and assets here and elsewhere, which had come to his hands as such receiver, and received the money therefor, giving the particulars; and that he had sold real estate belonging to the firm of A. & J. C. S. Harrison, and having received the purchase-money, had executed conveyances thereof under the order of the court. And appellee further said, that he had employed counsel to conduct litigation growing out of and connected with the administration of his trust; and that, in all his conduct of the business of such trust, he had acted in good faith and in the honest belief that his appointment, as such receiver, was legal and valid. And appellee averred the fact to be that, at the time the complaint of Alfred Harrison

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against John C. S. Harrison was filed, there were large unsettled differences of account between them, as partners, rendering an accounting between them necessary in the closing of their business, as prayed in such complaint, and appellee denied that there was any other or different understanding or agreement between the parties to that suit as to the proceeding therein than was set forth in his answer; and he also denied that what was done in that suit, was done for any other purpose, or with any other intention, than was alleged in his answer. Wherefore, etc.

As we have already said, the sufficiency or, as appellant claims, the insufficiency of the facts stated in appellee's answer to constitute a defence to appellant's suit herein, is the only question we are required to consider and decide; and this question was presented to the court below in general term, and is properly presented here by the alleged error of the court at special term, in overruling the demurrer to such answer.

It is manifest, we think, that in the proceedings had, and the orders made, by and before Judge Walker, sitting in his chambers, in vacation, in the suit of *Alfred Harrison v. John C. S. Harrison*, for the appointment of a receiver for the insolvent banking firm of A. & J. C. S. Harrison, the learned judge and the parties to such suit acted, or intended to act, and believed they were acting, under and in conformity with the provisions of our civil code in relation to the appointment of receivers. In section 1222, R. S. 1881, in force since September 19th, 1881, it is provided as follows:

"A receiver may be appointed by the court, or the judge thereof in vacation, in the following cases:

"*First.* In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim.

"*Second.* In actions between partners, or persons jointly interested in any property or fund.

"*Third.* In all actions, when it is shown that the property,

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fund, or rents and profits in controversy is [are] in danger of being lost, removed, or materially injured.

"Fourth. In actions by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; or when such property is not sufficient to discharge the mortgage debt,—to secure the application of the rents and profits accruing before a sale can be had.

"Fifth. When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

"Sixth. To protect or preserve, during the time allowed for redemption, any real estate or interest therein sold on execution or order of sale, and to secure to the person entitled thereto the rents and profits thereof.

"Seventh. And in such other cases as may be provided by law; or where, in the discretion of the court, or the judge thereof in vacation, it may be necessary to secure ample justice to the parties."

In the foregoing section, and in every section of the civil code in relation to receivers, it will be seen that the judge of the court in vacation is clothed with exactly the same power and authority, no greater and no less, as is the court itself when in regular and open session. In the vacation of his court the judge thereof has the power and authority to appoint receivers in any of the cases specified in section 1222, above quoted, or in any other case provided by law, or when, in his discretion, it may be necessary to secure ample justice to the parties, he may order property, which is the subject of litigation, to be deposited in court, or with the clerk thereof in vacation, or delivered to the party subject to his further order or that of the court; he may punish the disobedience of any such order as for contempt, and, in addition, may make an order requiring the sheriff to take the money or thing, and deliver it or deposit it in conformity with his direction

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or that of the court; and under his control or that of the court, the receiver has power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts in his own name, and generally to do such acts respecting the property, as the court or the judge thereof may authorize.

When the judge of a court, in vacation, is engaged in doing these acts and making these orders, it is clear, we think, that he is exercising *quoad hoc* "the judicial power of the State," and that his acts, orders and proceedings in the premises, although had in vacation, are the judicial proceedings of the court whereof he is judge. In section 1, of article 7, of our State Constitution of 1851, as such section was amended March 14th, 1881, it is provided as follows: "The judicial power of the State shall be vested in a Supreme Court, in circuit courts, and in such other courts as the General Assembly may establish." Section 161, R. S. 1881.

In *Shoultz v. McPheeters*, 79 Ind. 373, after quoting this section of the Constitution, the court said: "All judicial powers are, by force of this provision, vested in the courts of the State. The Legislature has no authority to invest any other tribunals than the courts with judicial powers. It is certain that the Legislature can not exercise judicial powers. *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427; *Doe v. Douglass*, 8 Blackf. 10; *Young v. State Bank*, 4 Ind. 301. Nor can these powers be vested elsewhere than in the tribunals designated or indicated by the Constitution. Judicial powers can not be delegated." Accordingly, it was held in the case cited, that section 1404, R. S. 1881, wherein it was attempted to confer judicial power upon master commissioners in certain cases, was unconstitutional and void. So, also, in *Gregory v. State, ex rel.*, 94 Ind. 384 (48 Am. R. 162), it was held, in view of the constitutional provision above quoted, that judicial power can not be conferred by statute upon the clerks of courts.

It is true, however, that, in a legal sense, the judge of a court

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is the court; certainly, there can be no court, under our laws, constitutional or statutory, without a judge. *Rogers v. Beauchamp*, 102 Ind. 33; *Shoultz v. McPheeters*, *supra*. So nearly akin are the two words "court" and "judge," in legal parlance, that, as they are used in the sections of the code now under consideration, they may well be regarded as synonyms, each of the other. *Michigan, etc., R. R. Co. v. Northern Ind. R. R. Co.*, 3 Ind. 239, on p. 245.

It is in this legal sense, we think, that the words "judge thereof in vacation," so often mentioned in the sections of the code before referred to, relating to receivers, should be taken and understood to mean "court in vacation." In other words, the phrase "the court, or the judge thereof in vacation," so often found in those sections, by supplying or filling a manifest ellipsis and the interchange of synonyms, may be made to read, in strict accordance with the legislative intent, and in perfect harmony with the constitutional provision above quoted, as follows: The court when in lawful session, or the court in vacation; or thus: The judge in term, regular, adjourned or special, or the judge in vacation. When Alfred Harrison, by his attorneys, filed his complaint against John C. S. Harrison, and appeared therewith before Judge Walker, and when the defendant therein filed his answer to such complaint, and, without process, appeared before and submitted his answer to Judge Walker, sitting in chambers, in vacation, in a cause or matter of which the court, whereof Judge Walker was judge, had jurisdiction, we are of opinion that the court, or judge in vacation, thereby acquired full and complete jurisdiction of the subject-matter of such suit, and of the persons of the parties, plaintiff and defendant. The defendant had the legal right to appear in person for himself, without the issue or service of process. His voluntary appearance in the suit was equivalent to service of process therein, and such suit was commenced from the time of such appearance. Sections 315 and 1230, R. S. 1881.

It must be borne in mind that the legislation of this State,

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which confers precisely the same judicial power upon the judge of the court in vacation as upon the court in term, in relation to the appointment and control of receivers, and the management and disposition of the property in their hands, as heretofore stated, was first enacted by the General Assembly, and approved by the Governor on March 31st, 1879, and took effect and was in force on May 31st, 1879. This legislation was substantially re-enacted as a part of the civil code of 1881, and appears in the Revised Statutes of 1881, as sections 1222 to 1228 inclusive. In the same connection, and as a part of the civil code of 1881, the General Assembly enacted two new sections, of and concerning receivers, which are a revision of an act approved March 12th, 1875 (Acts 1875, Reg. Sess., p. 117), and are known as sections 1230 and 1231, R. S. 1881. It is provided in section 1230 as follows:

“Receivers shall not be appointed, either in term or vacation, in any case, until the adverse party shall have appeared, or shall have had reasonable notice of the application for such appointment, except upon sufficient cause shown by affidavit.”

This section, it will be seen, provides for the voluntary appearance of the adverse party before the court or judge, either in term or vacation, or else that such party must have had reasonable notice of the application to the judge or court, either in term or vacation. But to what end shall the adverse party appear, or shall he be given reasonable notice of the application, if not to confer jurisdiction of his person upon the court or judge, either in term or vacation? Fairly construed, this section so strongly implies, as to strongly affirm, that receivers may be appointed by the judge or court, either in term or vacation, in any proper case, when the adverse party voluntarily appears before either the court or judge, or has had reasonable notice of the application, either in term or in vacation. If the adverse party voluntarily appear, or if, upon reasonable notice, he either appear or make default before the judge or court, either in term or

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vacation, in an equitable suit or application for the appointment of a receiver, and the proper orders are then and there made by the court or judge, either upon a hearing had or upon his default, for the appointment of a receiver and for the management and disposition of the property *in custodia legis*, can such party afterwards be heard to claim collaterally, or even upon a direct appeal, that all such proceedings by court or judge, either in term or vacation, are absolutely null and void, either because the plaintiff's complaint or application did not state a cause of action or show an adversary proceeding? Or because no summons was issued or served on such complaint or application, and hence there was no action pending? Or because the adverse party, in such complaint or application, voluntarily appeared and filed his answer thereto before the judge in vacation, when, as claimed, there was no statute authorizing such voluntary appearance before the judge in vacation, or making such appearance equivalent to the service of a summons issued on such complaint or application, and to the commencement of a suit in equity at and from the time of such appearance?

In the light of section 1230, above quoted, we are of opinion that these questions, each and all, must be answered in the negative. As already stated, it must be held that the voluntary appearance of John C. S. Harrison to the complaint of Alfred Harrison against him, before Judge Walker in vacation, in a suit whereof the judge in vacation has the same judicial cognizance, and as to which he is by law clothed with the same judicial power of the State, as the court in term of which he is judge, is equivalent to the issue and service of process therein; and the suit must be deemed to have been commenced at and from the time of such appearance.

In section 1231, *supra*, it is provided as follows: "In all cases hereafter commenced or now pending in any of the courts of this State, in which a receiver may be appointed or refused, the party aggrieved may, within ten days thereafter,

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appeal from the decision of the court to the Supreme Court, without awaiting the final determination of such case," etc.

It will be observed that this section of the civil code makes no provision, in express terms, for any appeal from the orders of the judge in vacation, either appointing or refusing to appoint a receiver. Yet it can not be doubted, as it seems to us, that in the enactment of this section of the code, the General Assembly intended to and did provide that whenever the court or judge, either in term or vacation, in any case thereafter commenced or then pending, might appoint or refuse to appoint a receiver, the party aggrieved might, within ten days thereafter, appeal from the decision of the court or judge, either in term or vacation, without awaiting the final determination of the case. This is the construction given this section of the code in *Barnes v. Jones*, 91 Ind. 161, which was an appeal from the appointment of a receiver by the judge, in vacation, where, as in the case of *Alfred Harrison v. John C. S. Harrison*, the relief sought was the dissolution of a partnership and the appointment of a receiver, and the order of the judge was affirmed by this court. This section of the code and the construction we have placed upon it give strong support, we think, to our opinion already expressed, that the words "court" and "judge," as they are used in the sections of the code providing for the appointment of receivers, and for the management and disposition of property in their hands, may well be regarded as synonyms, each of the other.

Whether the complaint of Alfred Harrison, or the answer of John C. S. Harrison, be good or bad, or whether the court, or judge in vacation, committed error in any of the acts, orders or proceedings, had or done upon such complaint and answer, are questions we are not required to consider and decide in the case in hand. Such acts, orders or proceedings, even though they might be found to be erroneous, were certainly not void, because, as we have seen, the court or judge in vacation had jurisdiction of the subject-matter and of the

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persons of the parties. Appellant's suit is a collateral attack on such acts, orders and proceedings of the court or judge in vacation in the appointment of the appellee as receiver, and can not be maintained. This point was so decided by this court in *Cook v. Citizens Nat'l Bank*, 73 Ind. 256. The court there said: "Whether the action of the court in appointing a receiver was according to law, we need not decide. If the appointment was erroneous, it was not void, and can not, in a collateral proceeding, be assailed, even by the parties thereto, and certainly not by strangers in the attitude of the appellant." *Kerr Receivers*, p. 166; *Storm v. Ermantrout*, 89 Ind. 214.

It was claimed in argument by appellant's counsel that the suit and proceedings before Judge Walker, in vacation, which resulted in appellee's appointment as receiver, were in contravention of the terms of the statute providing for voluntary assignments by insolvent debtors of all their property, in trust for the benefit of all their creditors. This claim is wholly untenable, as it seems to us, and can not be sustained. There is no substantial conflict between that statute and the provisions of the civil code, in relation to the appointment of receivers. But if there were such conflict, it needs no argument to show that the statute in question must give place to the provisions of the code, as the later expression of the legislative will. The voluntary assignment law took effect on March 5th, 1859, while the provisions of the civil code for the appointment of receivers, in certain cases, became a part of our law, on September 19th, 1881. The statute and the provisions of the code referred to, we think, may well stand together as parts of our law. While it is true that the firm of A. & J. C. S. Harrison might, not under the letter of the statute, but under its provisions as construed by this court, have made a voluntary assignment in trust for their creditors, yet, it must be held that this fact would not preclude either member of the firm from resorting to a court of equity for the appointment of a receiver. Under either procedure, the

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end to be accomplished is precisely the same, namely, the equal distribution of the property and assets of the firm among its creditors.

The Marion Superior Court is a court of general jurisdiction, and, as such, is clothed with the judicial power of the State. Its proceedings, whether in term or vacation, are judicial proceedings, and can not be collaterally attacked. We conclude, therefore, in the case at bar, that appellee's answer is a complete defence to appellant's cause of action, and that the demurrer to such answer was correctly overruled.

We find no error in the record of which appellant can complain.

The judgment is affirmed, with costs.

MITCHELL, J., dissents, and will file a dissenting opinion.

ELLIOTT, J., took no part in the decision of this cause.

Filed Jan. 29, 1886.

DISSENTING OPINION.

MITCHELL, J.—Unable to concur with the majority, the following are some of the reasons upon which my dissent is based :

That an action must be pending before either a court in term or a judge in vacation can acquire jurisdiction to appoint a receiver, unless in exceptional cases expressly provided for by statute, has, I think, never been the subject of judicial controversy. Upon this the authorities are everywhere in accord. *Dale v. Kent*, 58 Ind. 584; *Brinkman v. Ritzinger*, 82 Ind. 358; *Pressley v. Harrison*, 102 Ind. 14; *Merchants', etc., Bank v. Kent*, 43 Mich. 292; *Hardy v. McClellan*, 53 Miss. 507.

The remedy is merely an auxiliary to, and an incident of, a pending suit. *Hottenstein v. Conrad*, 9 Kan. 435; *Chicago, etc., Mining Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83; *Bufkin v. Boyce*, 104 Ind. 53.

A receiver is only resorted to in any case to preserve property *in statu quo*, pending a contest. The case pending must

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be a suit in equity, involving the property in controversy. *Schlecht's Appeal*, 60 Pa. St. 172; *Emerson & Wall's Appeal*, 95 Pa. St. 258; *Cincinnati, etc., R. R. Co. v. Sloan*, 31 Ohio St. 1.

The statute applicable in that respect provides that "receivers may be appointed by the court or judge thereof * * * in actions between parties, or persons jointly interested in any property or fund."

As requisite to the pendency of an action in which a receiver may be appointed, it is essential that a written complaint or petition exhibiting something in the nature of a controversy or cause of action of equitable cognizance shall have been filed.

This is required by the statute, as well as by the course of judicial procedure recognized everywhere, to the end that a subject-matter shall be brought within the jurisdiction of the court. Two things are indispensable before the intervention of any court can be invoked to pronounce judgment *inter partes*: 1. A controversy of some kind between parties involving legal or equitable rights. 2. That the matter in controversy shall be presented in such manner that the court may act judicially in the premises. Without these, a court can not proceed to give judgment, even with the consent of the parties. These being absent, nothing is pending before the court.

In *Morrow v. Weed*, 4 Iowa, 77, it was said: "If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, the sufficiency of it can not be called in question collaterally." *City of Terre Haute v. Beach*, 96 Ind. 143.

Admitting to the fullest extent that where a receiver has been appointed in a pending action, the sufficiency of the complaint in that action can not be drawn in question collaterally, the difficulty in this case still remains, that in the proceeding in which the receiver was appointed, it affirmatively appears

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that no complaint at all, nothing in the nature of a complaint, was filed.

While it is not necessary, for the protection of a purchaser from a receiver, that the proceedings and appointment should appear to be regular, the rule is that three things are essential: 1. He must see that a suit in equity was pending in which a receiver was appointed. 2. That the receiver was authorized by the court to sell the property in controversy. 3. That a sale was actually made under such authority. *Koontz v. Northern Bank*, 16 Wall. 196.

If there was no suit in equity, *inter partes*, when the receiver was appointed, the appointment was a nullity and would be disregarded whenever it came in question, unless by acquiescence an estoppel intervened. *People v. Judge*, 31 Mich. 456.

It is settled that a judgment in a case requiring adversary proceedings is void whenever it appears on its face, or may be shown by evidence, to have been rendered without jurisdiction of a subject-matter. *Horner v. Doe*, 1 Ind. 130; *McCormack v. First Nat'l Bank*, 53 Ind. 466.

To my mind, the complaint which is set out in the opinion of the court exhibits nothing in the nature of a controversy of any kind between the partners. It states no facts tendering any kind of an issue or upon which a judgment of any kind could have been pronounced. Nothing is complained of, except that the depositors of the bank have demanded their money with such persistency that the bank has become insolvent. It informed the court that in order to prevent a multiplicity of lawsuits and secure an equal distribution among creditors, it was important that the court should take control of the business of the firm by appointing a receiver. No disagreement between the partners appearing, or other reason why the end desired could not be accomplished by resorting to the statutory method, the intervention of a court was neither necessary nor proper to accomplish a vol-

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untary assignment, which was all that was asked for by this so-called complaint. High Receivers, section 10.

If any doubt had remained as to the purpose of this so-called complaint, it must have been dissipated when the supplemental complaint was filed. In this it was averred that the partners were possessed of a large amount of individual real and personal property which they were willing to surrender for the benefit of their creditors, and which the court was asked to take control of. The whole proceeding was, without any disguise whatever, an appeal to a judge in vacation to take the individual and firm property of the Harrisons under the shelter of the court.

To my mind, it was of no more legal force than if they had made the same appeal to any other individual. See *Shoemaker v. Smith*, 74 Ind. 71. As was said in *Sage v. Memphis, etc., R. R. Co.*, 18 Fed. Rep. 571: "It is also apparent that this is not an adversary proceeding, but one in which the parties complainant and defendant have acted in concert."

I do not understand that a court of equity can acquire jurisdiction to take upon itself the administration of the affairs of a bank or the distribution of the private estates of bankers, on request, simply because the bank has become unprofitable or insolvent and a source of annoyance to its owners.

The rule was forcibly stated in *Overton v. Memphis, etc., R. R. Co.*, 10 Fed. Rep. 866, thus: "It is not the province of a court of equity to take possession of the property, and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which can not be saved or protected by any other action or mode of proceeding."

To characterize a paper like that set out as a complaint, or bill in equity, is to disregard the substance and grasp at that which is less substantial than a shadow. Either it must be conceded that a receiver may be appointed upon request of

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one partner, without the existence of any controversy or disagreement whatever between the partners, upon the mere showing of insolvency, or it must follow, as it seems to me, that there was lacking in this case the first essential element of a suit, *i. e.*, the statement in writing of something in the nature of a complaint. R. S. 1881, section 338.

If, however, it be conceded that there was a sufficient complaint to call into action the jurisdiction of the court over a subject-matter, it was nevertheless necessary to the pendency of an action that process should have been issued, or that the defendant should have appeared in some manner known to the law, so as to give the court jurisdiction of his person.

It has heretofore been well settled in this State that a court can acquire jurisdiction of the person of a defendant in no other way than through its process or by a voluntary appearance in the case entered of record in open court in term time.

That no summons was issued is conceded, and that no other appearance by the defendant was made in the case except to go before the judge at chambers and present his written consent that a receiver might be appointed, is also admitted. In the prevailing opinion this is held to have been such an appearance in court to the case as constituted it an action pending at the time the receiver was appointed.

The scope and effect of the holding is that a judge sitting in vacation, exercising special statutory powers, such as are involved in the appointment of a receiver, etc., becomes the court of which he is the judge, and that such proceedings before him are proceedings in such court; that an appearance before a judge so sitting is such an appearance in court as confers original jurisdiction over the person of the defendant, and without any other process or appearance makes the matter upon which the judge acts a case pending in court. It seems to be implied, too, that to the proceedings of a judge so acting all the presumptions which attach to the proceedings of courts of general jurisdiction will be indulged when they are drawn in question collaterally. With deference to the

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opinion of the court, this view seems to me untenable in the nature of things, and entirely unsupported by authority. In my opinion, both reason and authority support the view that a judge so sitting constitutes a special tribunal of limited statutory power, and, like all special tribunals, no presumptions are indulged in favor of his jurisdiction; that facts or conditions necessary to confer jurisdiction must affirmatively appear; that he does not constitute the court of which he is the judge, and that his proceedings are no part of the proceedings of the court, and do not become part of its record. His sitting in vacation is confined to no time or place; the law provides for no record of his proceedings, and he can keep none, and, as a consequence, anything which in the course of judicial procedure is required to be proved by the record, such as an appearance of a party in court, a ruling or decision upon any question of law, can not occur before him.

The extent to which any court has gone in respect of upholding the jurisdiction of a court under like circumstances, so far as I can discover, is, to hold that where it appears in an order appointing a receiver, by the recitals in the order, that an action was pending, such recital constituted *prima facie* evidence of the pendency of the action. Such recitals are not conclusive, and may be contradicted. *Potter v. Merchants' Bank*, 28 N. Y. 641.

It is the rule in the Federal court, and many of the States, that where a court of general jurisdiction exercises a special statutory power, which was not according to the course of the common law, its jurisdiction, both as to the subject-matter and the person, must affirmatively appear, and everything will be presumed to be without its jurisdiction which is not affirmatively shown to be within it. *Galpin v. Page*, 18 Wall. 350.

The argument on which the prevailing opinion rests is, that the appointment of a receiver is the exercise of a judicial function, and that as under the Constitution judicial power can only be conferred upon courts, a judge while ap-

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pointing a receiver is exercising judicial power, and is, therefore, the court of which he is the judge.

It is difficult to see in what respect the exertion of judicial power is involved, where, as in this case, the sole purpose of the appointment of a receiver appears to be to effect an assignment for the benefit of creditors. In my opinion it might as well be said that such an assignment was a judicial act, and could only be made by the intervention of a court. That the power to pronounce a judgment which determines or finally adjudicates upon the rights of persons or the title to property is a judicial function which can only be conferred upon courts, is well settled. There are, however, many orders made in cases pending and many proceedings had in matters temporarily affecting property, the making of which are not regarded as the exercise of judicial functions. Thus in the case of *Carey v. Giles*, 9 Ga. 253, the question was directly made whether the appointment of a receiver was the exercise of judicial power. LUMPKIN, J., delivering the judgment of the court, said: "Was the appointment of a receiver a judicial act? If so, it is very clear that it could not be made by the Legislature, without violating an express provision of the Constitution. But it does not seem to us to be of this description of power. It was not a case of controversy between party and party; nor is there any decree or judgment affecting the title to property; it determines no right, legal or equitable. The receiver is merely to collect, hold and disburse the assets of the bank for the benefit of all concerned; and it is in the power of the courts to direct and control him in the proper execution of his duties." So, also, in an analogous case, *Foote v. Forbes*, 25 Kan. 359, it was held that orders made by a judge at chambers, in granting and dissolving a temporary restraining order, were not judicial acts. The court there said: "It is not an adjudication that can affect anything further than the granting or dissolving of the injunction; and except for the granting or dissolving of the injunction, it is no adjudication at all." See, also, *Toledo*,

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etc., *R. W. Co. v. Dunlap*, 47 Mich. 456; *United States v. Ferreira*, 13 How. 40.

Under an act of Congress the comptroller is authorized to appoint receivers in certain cases, and his authority in that regard has often been maintained in the courts.

To the foregoing might be added many other cases of like import, but as I should not feel inclined, without further consideration, to go to the extent of holding that the appointment of a receiver or granting an injunction under our statute was not in such sense a judicial act as that the power to make such appointments could only be conferred upon a judicial officer, who while exercising such power, constituted a special tribunal or court in a limited sense, I pursue the inquiry no further. That *quasi* judicial powers may be conferred upon tribunals which are not courts, in the strict sense of the term, there can be no doubt. *Shoultz v. McPheeters*, 79 Ind. 373; *United States v. Ferreira*, *supra*. Such are the powers which are conferred by statute upon a judge in vacation, and such a court is constituted when a judge acts in obedience to the powers thus conferred.

The power of a judge in vacation was the subject of judicial consideration at a very early period in the history of this court, and his power and jurisdiction, and the relation which he occupied to the court of which he was the judge, were defined in a manner consistent with the whole course of legislation and judicial interpretation since. *Newman v. Hammond*, 46 Ind. 119; *Ferger v. Wesler*, 35 Ind. 53; *Batten v. State*, 80 Ind. 394; *Cain v. Goda*, 84 Ind. 209.

In the case of *Taylor v. Moffatt*, 2 Blackf. 305, after defining the jurisdiction and power of a judge, sitting in term, the court said: "But when he is acting in vacation his situation is different: his jurisdiction is special and limited. He can not be strictly said to be acting as a court of chancery." So, again, in the case of *City of Columbus v. Hydraulic, etc., Co.*, 33 Ind. 435, in which it was held that the judge of the common pleas court had power to issue an injunction in a

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case pending in the circuit court, it was said: "The judge of the common pleas is not in vacation the court of common pleas, and so of the circuit judge. But each exercises in vacation whatever power in this respect is conferred by statute as an officer clothed with the special authority, having for that purpose the power which the proper court would have in term, and being, in a certain limited sense, that court for the time being. * * * The judge in vacation is not the court, though for certain purposes he possesses its powers, and is for that reason called a *court*."

That a judicial officer may be clothed with certain limited statutory powers of a judicial character, can not be questioned, and that in a certain limited sense he is, while exercising those powers, a court, may be admitted, but it does not follow that he thereby becomes the court of which he is the judge, or that he has any jurisdiction beyond the express letter of the statute. Upon this subject the Supreme Court of California said, in the case of *Spencer Creek Water Co. v. Vallejo*, 48 Cal. 70: "It is beyond question that the county judge is not the county court, and although the Legislature may authorize the judges of the several courts to perform certain duties, at chambers, in respect to proceedings in a cause, yet some court has jurisdiction of the cause, and the judge, in chambers, whether of the same or another court, acts as a commissioner, or in some other capacity, merely in aid of and subordinate to the court having jurisdiction of the cause."

In the case in which the appellee in this case was appointed receiver there was no action pending in court, in aid of whose jurisdiction the judge at chambers acted. The question is, could the judge, by taking jurisdiction over a defendant who came before him to consent to the appointment of a receiver, thereby constitute the case in which the receiver was appointed an action pending? Could he, by taking original jurisdiction over a defendant in a matter not pending in any court, acquire a jurisdiction which he could only exercise in a pending cause?

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The only conclusion which in my opinion is justified upon authority and precedent, is that he could not. That a judge in vacation may be, and under the statute is, invested with special authority to make such orders in a case pending, in aid of the jurisdiction of the court in which the action is pending, is thoroughly settled; but that he is not and can not be made the medium through which original jurisdiction can be acquired in such a case, is equally well settled. A judge, sitting in vacation, is not a court of record; he has neither clerk, seal nor record. He has in vacation no more authority or control over, or right to enter anything upon the records of the court, unless expressly authorized by statute to do so, than any other citizen. That an appeal is provided for from orders made by a judge in vacation determines nothing as to the extent of his authority, nor does that fact constitute him a court. There are many proceedings had before inferior officers and municipal bodies from which an appeal may be taken to the circuit courts, but this does not constitute such officers or bodies courts.

Under section 7, Acts 1883, p. 180, an appeal may be taken from the action of a township trustee in a drainage case, but that fact does not constitute the trustee a court.

While sitting in vacation, a judge does not come within any known definition of a court as ordinarily understood. While holding court in one county, he may, upon proper application, make an order appointing a receiver, or grant an injunction, in a case pending in any other county in his circuit. This practice prevails uniformly, and has been upheld in this court. Thus it might often happen that one judge might at the same time have the circuit court of two counties open for appearances and proceedings, and in that manner constitute the circuit court in two counties during the same period.

A judge sitting a hundred miles from the county seat, without any record before him, might nevertheless take proceedings and enter the appearance of a defendant in a cause not yet commenced. It would thus result that the evidence

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of an appearance in court, or of pleadings filed and rulings had in the circuit court, would rest in the memory of the judge, or be preserved in such temporary orders as might be made wherever the judge might chance to be found.

It was said in *Blair v. Reading*, 99 Ill. 600: "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation except such as are expressly authorized by statute."

There is no statute or precedent which authorizes an appearance to be entered before a judge sitting in vacation, nor have we any statute which prescribes what acts shall constitute an appearance. What shall constitute an appearance, therefore, rests upon the well established rule of the common law, as it has been perpetuated and declared time out of mind. According to this rule, steadily maintained and often declared by this court, an appearance is the making of some formal entry, plea, motion, or official act in open court. It is essential that this should be of record; it can be proved only by the record. *Scott v. Hull*, 14 Ind. 136. Moreover, it has been repeatedly ruled by this court, that whenever the law contemplates the doing of an act by or in a court, "it is and must be understood that the court in term time may or must do it, and the judge in vacation can not, unless the power is expressly conferred upon him by law." *Newman v. Hammond*, 46 Ind. 119. *Ferger v. Wesler*, *supra*; *Batten v. State*, *supra*.

Thus it was said in *McCormack v. First Nat'l Bank*, 53 Ind. 466: "An appearance, according to the ancient practice, purports to be a proceeding in term time, and that theory still exists in legal contemplation." Unless, therefore, it can be held that a judge sitting in vacation is not only the court of which he is the judge, but that his sitting constitutes part of a term of court, an appearance can not be entered before him within any precedent that I have been able to find. The rule, forcibly and tersely announced in the language above

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quoted, has been steadily maintained and uniformly enforced through a line of decisions of this court from *Shirley v. Hagar*, 3 Blackf. 225, down to *Pressley v. Harrison*, 102 Ind. 14.

It is especially because the prevailing opinion, as it seems to me, overturns this rule thus maintained, and announces one which, in my judgment, is anomalous, and, so far as I have been able to discover, without precedent anywhere, that I am unable to yield my assent to it.

In my opinion it would be much better to hold that a receiver might be appointed without any action pending at all, than to bring about the pendency of the action by a holding which constitutes a judge in vacation, wherever he may happen to be, the court, before whom parties may enter an appearance, which has uniformly heretofore been required to be entered in term time, and proved only by the record made in open court.

The rule, as it has been strictly held by this and other courts, has been, that all business and matters which pertain to the general jurisdiction of courts can only be transacted when the court is in session in regular or special term, sitting with its clerk, record and officers as a court. Business which may be transacted at any other time is exceptional, and for authority to do it express warrant must be found in the statute.

For the foregoing reasons I think an appearance can not be entered for the first time before a judge in vacation, and that pleadings in the case can not be filed with or entertained by him. The pleadings referred to in section 1225, R. S. 1881, are very clearly pleadings filed in the case in court. This is consistent with the practice of the chancery courts, in which an application for the appointment of a receiver is never entertained, unless upon an emergency shown, until the answer of the defendant to the bill is brought in.

It may be inferred from the opinion of the majority, that

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a receiver may be resorted to for the sole purpose of effectuating a voluntary assignment and placing the property of an insolvent partnership *in custodia legis*, to be administered for the benefit of creditors. It is suggested, too, that if there is any conflict between the statute regulating voluntary assignments and that under which receivers are appointed, the latter must prevail. My view of the matter is, the statutes in no wise relate to the same subject, and are in no manner in conflict. The statute regulating voluntary assignments was designed to secure to a failing debtor the opportunity to make an equal distribution of his estate among all of his creditors, and, as this court has often held, where a statute prescribes a remedy which was not known at common law, such remedy is exclusive of all others. Receiverships, on the other hand, were never designed or used for the purpose of accomplishing assignments and the distribution of property.

A receiver is an adjunct of a court of chancery, an indifferent person to take charge of and preserve property which is the subject of litigation until the suit involving the title is terminated and the right to the property settled. Moreover, it is a cardinal principle, everywhere enforced, that a receiver will never be appointed by a court of chancery if there is any other expedient remedy available to accomplish the same end for which the receiver is applied for. Thus, where proceedings were instituted to wind up a banking corporation for the appointment of a receiver to wind up its affairs, but it was apparent from the bill that the matters might be remedied by following the prescribed course of law, the application was not entertained. High Receivers, sections 10, 301, 403, 555, 592.

Filed Feb. 9, 1886.

No. 12,602.

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DIVORCE.—Change of Venue.—Practice.—A divorce proceeding has all the requisites of an action, and is a civil action, as defined by the code, in such a sense that the provisions of the civil code providing for a change of venue from the county are applicable. *Musselman v. Musselman*, 44 Ind. 107, disapproved.

ELLIOTT, J., dissents. MITCHELL, J., doubts.

From the Kosciusko Circuit Court.

J. S. Frazer, W. D. Frazer, A. G. Wood and R. B. Encell,
for appellant.

E. Haymond, L. W. Royce, A. Brubaker and J. H. Brubaker,
for appellee.

ZOLLARS, J.—The court below awarded to appellee a divorce, alimony and the custody of the children.

Appellant prosecutes this appeal and insists that the judgment should be reversed, because the trial court overruled his motion for a change of venue from the county. That motion was based upon an affidavit, in which appellant stated that he could not have a fair and impartial trial in Kosciusko county, for the reason that appellee had an undue influence over the citizens of that county, and for the reason that an odium attached to him in that county on account of local prejudice against him.

The above affidavit states the causes for a change of venue from the county, as those causes are provided and stated in the code of civil procedure. R. S. 1881, section 412. That section provides as follows: "The court in term, or the judge thereof in vacation, shall change the venue of any civil action upon the application of either party, made upon affidavit showing one or more of the following causes: * * *

"*Third.* That the opposite party has an undue influence over the citizens of the county, or that an odium attaches to the applicant * * * on account of local prejudice. * * *

106	204
147	179
105	201
148	221

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"*Seventh.* When either party shall make and file an affidavit of the bias, prejudice, or interest of the judge before whom the said cause is pending."

The divorce act contains no provision for a change from the judge, nor for a change of venue from the county. The above section of the civil code, it will be observed, provides for a change of venue in *civil actions*. We are thus met, *in limine*, with the one question in the case, viz.: Is a divorce case a civil action in such a sense that the above section of the code of civil procedure is applicable thereto?

In the recent case of *Powell v. Powell*, 104 Ind. 18, after a careful examination of the question, it was held, that where the procedure is prescribed in the divorce act, that should be pursued, and not the civil code; that so far as a procedure is provided in that act, it may be called a special proceeding, and that where it is apparent that the Legislature intended that certain sections of the civil code should not apply in divorce cases, they will not be applied. It was further held, that, under the code, divorce cases are, in some sense at least, "civil actions;" that the rules of pleading and practice provided in the civil code will apply to them, except to the extent that a different procedure may be provided in the divorce act, and to the extent that it may be apparent that the Legislature intended otherwise. As a result of these holdings, it was further held, that the above section of the civil code, providing for a change from the judge, is applicable to divorce cases, and that upon the filing of the proper affidavit under that section, in any case, the change must be granted.

We can see no reason why the reasoning and conclusion in that case are not applicable, and controlling here. Changes of venue are provided for, in order that parties litigant may have fair and impartial trials, and hence the provision for a change from an interested or biased judge, and hence, also, the provision for a change of venue from the county where one of the parties may have an undue influence over the citizens, or where an odium may attach to one of the parties, or

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to his cause of action or defence, on account of local prejudice. The parties to a litigated case are entitled to a trial in a forum where the scales of justice may balance evenly, unaffected by the influence of either party, or the odium that may result from local prejudice. We can think of no case where this is more important than in a divorce case. Property is involved in the settlement of alimony. It has recently been held, too, by this court, reasserting former rulings, that all of the property rights of the parties, as between themselves, of whatever nature, must be settled in the divorce proceedings, and that they will be presumed to have been so settled. *Rose v. Rose*, 93 Ind. 179; *Behrley v. Behrley*, 93 Ind. 255.

More than property is involved in the adjudication that shall sunder the marital relation, fasten upon one of the parties, it may be, the brand of dishonor, break up the children's home, and deprive one of the parties of their society and companionship. It can hardly be supposed that the Legislature intended that such cases, fraught with such consequences, and in which the public have an interest aside from the parties, should be tried in a less impartial forum than ordinary civil actions, involving property only, and it may be a small amount of property. The more rational conclusion would seem to be that the intention was, that such cases should be tried in impartial tribunals, and that as no provision is made in the divorce act for reaching such tribunals by a change of venue, when necessary, the intention was, that resort might and should be had to the code of civil procedure.

There is nothing in the divorce act to show or indicate an intention on the part of the Legislature, that the above section of the code, providing for a change of venue from the county, should not be applicable to a proceeding for a divorce in a proper case, unless it be the facts that no such change is provided for in that act, that the case must be commenced in the county where the plaintiff resides, and that the

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case is to be tried by the court without a jury. If it be said that the fact that no such change is provided for in the divorce act, shows such an intention, then it may be answered that the act just as clearly shows an intention that in a divorce proceeding there shall be no demurrer, no continuance, no motion for a new trial, no exceptions, no bill of exceptions, and no appeal to the Supreme Court, because none of these are provided for in that act. For these several steps in the procedure, it is absolutely necessary to look to the civil code. The uniform practice has been to thus look to that code, and thus divorce cases have uniformly been recognized as in some sense, at least, civil actions.

It would hardly do to say that no change of venue shall be allowed from the county in divorce cases, simply because such cases are to be commenced in the county where the plaintiff resides, and are to be tried by the court without a jury. There are many cases that must be commenced in a particular and named county. For example, actions to foreclose mortgages must be commenced in the county where the land is situated. Such cases, actions to set aside fraudulent conveyances, actions for injunction, actions to set aside contracts for fraud, actions to settle partnerships, actions for specific performance, actions to enforce vendors' and like liens, and all that class of cases which, before the adoption of the Constitution, were of equitable cognizance, must now be tried by the court without a jury. In all these cases, the venue must be changed from the county upon motion, supported by the proper affidavit. They are civil actions, and the statute is emphatic, that in all civil actions the venue must be changed from the county upon motion supported by an affidavit, such as the statute declares to be sufficient. Hence it will not do to say that the venue can not be changed from the county simply because the case is to be tried by the court without a jury.

Of course, the reasons for allowing a change of venue from the county in cases triable by jury are apparent, and more apparent than in cases where a jury can not be demanded. Pos-

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sibly it would not be unreasonable to say that where cases are to be tried by the court without a jury, no sufficient reason appears why there should be a change of venue from the county, but that is a matter for the Legislature. It is enacted that the venue shall be changed from the county in all civil actions upon the filing of the proper affidavit. Clearly this court has no authority for going behind the statute to seek for reasons, and to adjudge them to be sufficient or insufficient. Doubtless the Legislature thought that reasons exist, and that they are sufficient. It may be possible that local prejudice against one party may be such, and the influence of the other party over the citizens of the county so great, as to affect the witnesses. In addition to this, the court may, in all cases, refer questions of fact to a jury. It has been held that this may be done in divorce cases. *Morse v. Morse*, 25 Ind. 156.

The court is not bound to, but may, adopt the finding of the jury upon the facts; and thus an injury might be inflicted in refusing to change the venue from the county in cases in which a jury trial can not be demanded as a matter of right. But, as we have said, these are matters for the consideration of the Legislature. The courts can not except from the operation of the statute any particular cases without assuming the functions of legislation, and they can not except divorce cases from the operation of the statute without holding that the Legislature intended that they should stand upon a less favorable basis than other cases. Such a holding, we think, is not authorized by the divorce act, nor any other enactment by the Legislature.

Why should a change of venue be allowed from the county in other cases triable by the court, and not in divorce cases? We are unable to think of any reason. We think there is no reason unless it be, so says the law.

The case relied upon by appellee, and the only one directly in point, is the case of *Musselman v. Musselman*, 44 Ind. 106. It was held in that case, that there can be no change of venue

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from the county in divorce cases, for two reasons: *First*. Because a divorce case is in no sense a civil action, and that hence the section of the civil code providing for a change of venue in civil actions is not applicable in divorce cases. *Second*. Because divorce cases are to be tried by the court without a jury.

The first reason upon which the case was made to rest, was overthrown by the case of *Powell v. Powell*, *supra*, it being there held, as we have already stated, that a divorce case is a civil action, in such a sense, at least, that the section of the civil code authorizing a change from the judge is applicable thereto. We shall not extend this opinion to repeat the reasoning in that case, but add a few additional observations.

The first section of the civil code provides as follows:

"There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." R. S. 1881, section 249.

In the mother country, divorce cases were formerly within the jurisdiction of the ecclesiastical courts. These courts we have not, and never had, either in the colonies or in the States. With us, all divorce jurisdiction comes from statute. 2 Bishop Marriage and Divorce, section 254.

At different times, different States adopted the practice of granting divorces by act of the Legislature. Such was the case at one time in this State. The Legislature, however, could not settle the question of alimony. The different States have adopted statutes, prescribing causes for divorce, and providing that they shall be granted by the courts after trial. As a general thing, they have been regarded as belonging to the equity courts, where such courts exist separate from the common law courts. Prior to the adoption of our Constitution of 1851, they were regarded as of equitable cognizance in this State. These statutes, especially the statutes of this

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State, have joined with the action for divorce the question of settling and fixing the custody of the children and the settlement of all property rights between the parties. It sometimes happens that the parties are indifferent about the divorce, but wage the severest litigation over the question of alimony and the settlement of property rights. It would not be reasonable to say, that in a case involving the questions of a divorce, the custody of children, the amount of alimony and the final settlement of property rights, the proceeding is in no sense an "action for the enforcement or protection of private rights and the redress of private wrongs." Where all of these interests are involved in a litigation, the proceeding is clearly an action. An action at law has been defined as follows: "The rightful method of obtaining in court, what is due to any one." *Badger v. Gilmore*, 37 N. H. 457. "An action is the lawful demand of one's rights in the form given by law." *Hall v. Decker*, 48 Maine, 255. "Any judicial proceeding which, conducted to a termination, will result in a judgment, is an action." *People v. County Judge*, 13 How. Pr. 398 (400).

"What is a civil action? It is an action wherein an issue is presented for trial, formed by the averments of the complaint, and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegations of the pleadings, and a judgment in such an action is conclusive upon the rights of the parties, and could be plead in bar." *Deer Lodge Co. v. Kohrs*, 2 Mon. 60, 70.

In a divorce case, under our statutes, issues are formed, evidence is heard, and judgment is rendered, settling the status of the parties and the rights of property, and such a judgment is conclusive and may be pleaded in bar. Such a proceeding has all the requisites of an action, and is a civil action, as defined by the code, at least, in such a sense that the provisions of the civil code providing for a change from

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the judge, and a change of venue from the county, are applicable thereto.

Of the second ground upon which the Musselman case rests, we have said sufficient. It results from the foregoing that the case of *Musselman v. Musselman*, *supra*, so far as it holds that there can not be a change of venue from the county in divorce cases, must be disapproved. It also results, that the judgment in the case before us must be reversed for the error of the court below in overruling appellant's motion for a change of venue from the county.

Judgment reversed at appellant's costs.

ELLIOTT, J., dissents.

MITCHELL, J., doubts.

Filed Feb. 19, 1886.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—We can not treat the refusal of the court below to grant a change of venue from the county as a harmless error. If we might so treat it in this case, simply because a trial by jury can not be demanded as a matter of right, then we might treat as a harmless error such a refusal in all other cases where a trial by jury can not be demanded as a matter of right. To so hold would be, to that extent, to overthrow the statute giving the right of a change of venue from the county. If that statute is an unwise one, resort must be had to the Legislature for its repeal, amendment or modification. When a statute is constitutional, this court can not question its propriety.

Appellant's legal rights, as given by the statute, were violated by the overruling of his motion to change the venue from the county. There is nothing in the record before us to show that this did not affect his substantial rights.

Upon the question of the duty of appellate courts, when a former decision is found to have been erroneous, we content ourselves with a citation of the cases of *Hibbitts v. Jack*,

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97 Ind. 570 (49 Am. R. 478), *Hines v. Driver*, 89 Ind. 339, and *Paul v. Davis*, 100 Ind. 422.

Petition for a rehearing overruled.

Filed March 27, 1886.

No. 11,396.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COM-
PANY v. HAZELETT.

PLEADING.—*Written Instrument.*—*Filing of Copy.*—Where the complaint alleges that a copy of the written instrument declared on is filed with and made a part thereof, and a copy follows in the transcript immediately after the complaint, this is sufficient to identify and show the filing of such copy.

SAME.—*Application for Life Insurance.*—*Exhibit.*—In an action upon a life insurance policy, it is not necessary to file a copy of the application with the complaint.

LIFE INSURANCE.—*Policy.*—*Inconsistent Provisions.*—*Construction.*—Where a policy of insurance contains inconsistent and contradictory provisions, that provision most favorable to the assured will be adopted.

SAME.—*Intemperance.*—*Forfeiture.*—*Cancellation.*—*General and Specific Provisions.*—*Inconsistent Stipulations.*—A specific stipulation in a separate clause of a policy of life insurance, that if the assured shall become intemperate to a certain degree the company may cancel the policy, and thus absolve itself from liability, will control a general stipulation that such a degree of intemperance shall work an absolute forfeiture.

SAME.—*Suicide.*—*Unintentional Self-Destruction.*—A provision in a policy of life insurance, that, whether sane or insane, if the assured shall die by his own hand, the policy shall be void, has no application to a case where death results by accident, or without intention or expectation, although it be caused by the hand of the assured, *e. g.*, where death is produced by an overdraft of whiskey taken, without any intention of destroying his life, by one who had become physically and mentally weak by causes which he could not control.

SAME.—*Answers to Questions in Application.*—*Warranty.*—*Burden of Proof.*—In an action on a policy of life insurance, the burden is upon the defendant to prove that answers by the assured to questions contained in the application are untrue.

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130 85
105 212
133 121
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158 308
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105 212
160 114
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168 658

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SUPREME COURT.—*Instructions.*—*Brief.*—*Practice.*—Where the legal proposition involved in an instruction is not stated in the brief of counsel, and nothing more is done than to indicate to the court the page of the record on which it may be found, with general observations concerning it, the objection to it will not be considered.

SAME.—*New Trial.*—*Evidence.*—*Bill of Exceptions.*—A motion for a new trial, based on alleged errors arising on the admission and exclusion of evidence, which refers to the evidence as set out in a bill of exceptions not yet filed, presents no question.

From the Putnam Circuit Court

T. Hanna and *S. A. Hays*, for appellant.

M. A. Moore, *G. C. Moore*, *D. E. Williamson* and *A. Daggy*, for appellee.

MITCHELL, J.—Sarah S. Hazelett brought suit against the Northwestern Mutual Life Insurance Company, to recover the amount of a policy of insurance issued upon the life of her husband.

The policy stipulates that upon due proof of the death of William J. Hazelett, the sum of three thousand dollars shall, within a time limited, be paid to his wife, Sarah S. Hazelett, as beneficiary. Issues were made upon a complaint filed in the court below, and upon trial by a jury, a verdict was returned upon which judgment was entered for three thousand three hundred dollars, the amount of the policy and accumulated interest. The first error assigned is that the court erred in overruling a demurrer to the complaint. The only defect suggested in regard to it is, that neither the original nor a copy of the policy sued on was filed with the complaint. Conceding that it contains an appropriate averment, that a copy of the policy is filed and made part thereof, and that a copy of a policy follows in the transcript immediately after the complaint, it is contended, nevertheless, that the transcript fails to show the actual filing of a copy.

The policy which is thus copied into the transcript conforms in all respects to that described in the complaint, and which it is averred therein "is filed herewith and made a

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part of this complaint." Within repeated rulings, this is a sufficient identification of the instrument sued on, and shows that it was filed with the complaint. *Whitworth v. Malcomb*, 82 Ind. 454; *Lentz v. Martin*, 75 Ind. 228; *Carper v. Kitt*, 71 Ind. 24, and cases cited. The application was referred to in the complaint in like manner, and is likewise copied into the transcript. It was not necessary that a copy of the application should have been filed with the complaint. *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310; *Penn Mut. Ins. Co. v. Wiler*, 100 Ind. 92 (50 Am. R. 769). A demurrer was sustained to the first paragraph of the defendant's answer. This ruling is assigned for error.

This answer sets up a defence, that the policy contained an express stipulation that if the assured should ever become intemperate, or so far intemperate as to impair health or induce delirium tremens, the policy should become null and void. It avers that, after the policy was delivered, the assured did become intemperate to such a degree as to induce delirium tremens.

The second clause of the printed conditions upon which the policy was accepted, as therein recited, contains among many other prohibitions in respect to the conduct and occupation of the assured, a prohibition against intemperance, the substance of which is stated in the answer as summarized above. This clause provides that the doing of any or all of the things prohibited therein shall render the policy null and void.

The fifth clause of the printed conditions of the policy is as follows: "5th. If the said insured becomes habitually intemperate, or so far intemperate as either to impair health or induce delirium tremens, then, in either such case, the company may cancel this policy, and thereupon be absolved from all liability upon the same except only the 'surrender value' thereof, computed according to the practice of the company, which surrender value it will pay on the surrender of this

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policy if applied for in the lifetime of the insured and within one year from the cancellation of the policy."

In the clause first alluded to, intemperance to the degree of impairment of health, or of inducing delirium tremens, worked an absolute forfeiture. In the other, the result which was to flow from the same conduct was, that the insurance company might cancel the policy, and by that means absolve itself from liability, except for the "surrender value."

The first stipulation is found in a printed clause in which is contained numerous other conditions, the violation of any one of which was to render the policy void. The last is a separate clause of the contract and is complete in itself.

It thus appears that two stipulations were incorporated in the policy, covering the same subject-matter. The one providing that upon certain conditions the policy should become absolutely void; the other, that upon precisely the same conditions, the insurance company might avoid the policy and absolve itself from liability to a certain extent. Since both of these conditions can not stand together, the inquiry is, which shall prevail?

While forfeitures are never favored, yet, if, upon a reasonable construction, it appears that the parties contracted for a forfeiture upon certain conditions, it only remains for the courts to enforce the contract as the parties have made it. It is neither unlawful nor against public policy for a contract of life insurance to stipulate that upon certain conditions or contingencies the policy should become void. *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478 (49 Am. R. 469); *Douglas v. Knickerbocker Life Ins. Co.*, 83 N. Y. 492.

A forfeiture will not be enforced unless it is clearly demanded by established rules governing the construction of written agreements. When a policy of insurance contains inconsistent or contradictory provisions, it is the rule that the provision most favorable to the assured will be adopted. *Moulor v. American Life Ins. Co.*, 111 U. S. 335; *National Bank v. Ins. Co.*, 95 U. S. 673.

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Courts will construe a contract of insurance liberally, so as to give it effect rather than to make it void. Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy. *Carson v. Jersey City Ins. Co.*, 14 Vroom, 300 (39 Am. R. 584); *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Bliss Life Ins.*, section 385.

In *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262 (48 Am. R. 205), it was said: "When a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he can not, after an acceptance by the other contracting party, set up the narrow construction."

The policy before us having been presumably prepared by the company, and containing on its face inconsistent or ambiguous stipulations as to the consequences which should result from intemperance, the meaning most favorable to the assured must be attributed to it. This rule is particularly applicable in a case like this, where a forfeiture is insisted upon. To hold otherwise would be to give a construction to the contract which would enable the insurance company to exercise its option, after having collected premiums, to insist upon a forfeiture or not according to its pleasure.

The consequence of intemperance was made the subject of a particular specific and separate stipulation in which no other subject is mentioned, and, according to well established rules of construction, when such is the case, the separate specific stipulation is to be preferred over a general stipulation inconsistent therewith.

As there was no averment in the answer that the insurance company had absolved itself from liability by cancelling the policy, according to the terms of the fifth stipulation contained therein, the demurrer to the first paragraph of the answer was correctly sustained.

The demurrer was substantially in the form of that considered in the cases of *Rennick v. Chandler*, 59 Ind. 354, and

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Stone v. State, ex rel., 75 Ind. 235, and is subject to the same criticisms as were there made. It sufficiently appears, however, that it was addressed to each paragraph of the answer separately. *Mitchell v. Stinson*, 80 Ind. 324. It is, therefore, not a joint demurrer, as contended, to all of the several paragraphs of answer.

It is assigned for error that the court erred in overruling the demurrer to the second and third paragraphs of reply. Both of these replies are directed to the fourth, fifth, sixth and seventh paragraphs of answer.

Each of these paragraphs of answer refers to a stipulation which is found in the policy, to the effect that, whether sane or insane, if the assured shall die by his own hand, the policy shall be void.

The fourth paragraph of answer, which fairly represents all the others, charges, in substance, that after the delivery of the policy, the assured voluntarily entered upon a course of dissipation, by an excessive use of spirituous and malt liquors as a beverage, whereby his mental and physical powers were enfeebled, and he was rendered less able to understand the nature and probable results of his own acts, and that while in such enfeebled condition, and without fully knowing the consequences of his acts, he procured and swallowed an excessive draught of alcoholic liquor, from the effect of which he died shortly thereafter.

The replies set up substantially, that the assured, prior to his death, from causes over which he had no control, became physically and mentally weak and diseased, and that he resorted to the use of spirituous liquors as a means of restoring his health; that during his physical and mental debility he accidentally, without any intention of destroying his life, took an overdose of whiskey, from the effect of which he became sick and died; that the results which followed the use of the whiskey were not expected nor intended by the assured; that, by reason of his weak and debilitated condition, the whiskey had an unusual, accidental and unexpected effect

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upon the assured, causing him to sicken and die, when no such result was expected or intended.

On behalf of the appellant, it is contended that because it is not denied that the assured voluntarily entered upon a course of dissipation, as charged in the answer, and because it is not denied that his weak and enfeebled condition was the result of such dissipation, the replies do not avoid the answer, notwithstanding the averments therein contained that the effect produced by the draught of whiskey was unexpected, unintentional and accidental. It should be stated, that it is averred in the second paragraph of the reply, that the assured did not use intoxicating liquors so as to impair his strength or destroy his health.

In the third paragraph, the averment is, that he became physically and mentally diseased and weak from causes over which he had no control.

Stipulations of the character here under consideration have been the subject of much discussion and of frequent judicial construction. It seems to be settled that such a clause in a policy of life insurance is a protection to the insurer, in case of voluntary and intentional self-destruction by the assured, whether sane or insane. *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232; *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389.

Such a clause has, however, no application to a case in which death resulted by accident or without intention or expectation, even though it was caused by the hand of the assured. Death resulting from accident, or from an act which at the time it was entered upon or engaged in was not expected or intended to produce that result, can not be said to be within the meaning of the policy. *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317 (39 Am. R. 660); *Pierce v. Travelers' Life Ins. Co.*, *supra*; *Burkhard v. Travellers' Ins. Co.*, *supra*.

The pleadings under consideration involve no question of insanity. It is not averred that the assured was insane.

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From causes over which he had no control, a state of mental and physical weakness resulted, and while in that state he took an overdraught of whiskey, without any expectation or intention of destroying his life. Death was, therefore, the result of an accident, and the policy is not avoided. The demurrer to the replies was properly overruled.

It is next contended that the court erred in overruling the appellant's motion for a new trial, and under this assignment it is insisted that the verdict is not sustained by sufficient evidence.

Without entering upon a discussion of the evidence, we think it does not establish the fact that William J. Hazelett intentionally destroyed his own life; nor does it so clearly sustain any of the defences on which the appellant relied as that it can be said the finding of the jury is not well supported by the evidence.

The giving, and refusing to give, certain instructions, were assigned as grounds for a new trial.

The objections which are stated as pertaining to the instructions are, in the main, of such a general character that we are led to conclude that no specific error was apparent to the appellant's learned counsel. Some of those upon which error is predicated were not assigned as grounds for a new trial in the motion filed for that purpose, and are for that reason not before us.

Where the legal proposition involved in an instruction is not in some way stated in the brief of counsel, and nothing more is done than to indicate to the court the page of a voluminous record on which it may be found, with some general observations concerning it, the objections to it will not be considered. *LaRose v. Logansport Nat'l Bank*, 102 Ind. 332.

Such of the instructions as relate to the clause in the policy which provides, that if the assured, whether sane or insane, shall die by his own hand, have been sufficiently considered in what has been already said on that subject in respect of the pleadings. The law of the case in that regard was cor-

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rectly interpreted to the jury in conformity to what has been expressed heretofore in this opinion.

Some of the instructions prayed for by the appellant proposed, as the law applicable to one feature of the case, that if the act which actually resulted in the death of the assured was voluntarily performed, and the probable result of the act was such that, owing to his enfeebled condition, death was likely to ensue, then the policy was avoided. We can not assent that this is a correct statement of the law as applied to the policy under consideration. As already stated, the clause alluded to does not exonerate the insurance company from liability, unless the act which caused the death of the assured when performed was intended to have that effect. If it were otherwise, it might happen that any one, in the delirium of sickness, who should do an act with the intent, so far as he had any intent, to restore himself to health, and which, under other circumstances, he might know was highly dangerous, would, nevertheless, if death should unexpectedly ensue, fall under the condemnation of having committed suicide, or died by his own hand. Thousands of persons have doubtless prematurely come to their death by taking a potion which aggravated, when the hope or purpose was that it might allay, a malady which distracted them. Possibly a physician could have told them, or in the absence of the malady they might have known themselves, that it was highly dangerous to take it when in an enfeebled condition. The instructions prayed for on this subject were properly refused.

Other instructions presented by the appellant requested the court to tell the jury that certain answers to questions contained in the application for insurance constituted warranties, and that the burden of proving the truth of such answers was on the plaintiff.

In the case of *John Hancock Mut. Life Ins. Co. v. Daly*, 65 Ind. 6, this point was considered, and it was there held, in accord with the general rule, that the burden was, under like circumstances, upon the defendant. *Insurance Co. v. Gridley*,

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100 U. S. 614; *Piedmont, etc., L. Ins. Co. v. Ewing*, 92 U. S. 377; *Swick v. Home Life Ins. Co.*, 2 Dillon, 160.

As causes for a new trial, it is assigned that the court erred in admitting and excluding certain evidence admitted and excluded.

None of the evidence thus admitted or excluded is identified in the motion for a new trial with sufficient certainty to present any question.

The motion for a new trial concludes with a statement that all the evidence improperly admitted or excluded is more particularly set out in a bill of exceptions containing the evidence.

The motion for a new trial was filed and overruled on the 5th day of October, 1883, and the bill of exceptions containing the evidence was not signed by the judge until November 3d, 1883. There was, therefore, no bill of exceptions such as that referred to in the motion on file at the time the motion for a new trial was overruled. *Harvey v. Huston*, 94 Ind. 527; *State, ex rel., v. Riggs*, 92 Ind. 336; *Miller v. Shriener*, 87 Ind. 141; *Burns v. Thompson*, 91 Ind. 146; *Bradway v. Waddell*, 95 Ind. 170.

Having thus considered all questions which the record presents, and finding no error, the judgment is affirmed, with costs.

Filed Jan. 27, 1886.

105	231
127	309
105	221
130	306
105	221
149	236
149	232
149	233
149	234

No. 12,343.

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TOWNSHIP TRUSTEE.—Lucrative Office.—The office of township trustee is a lucrative office within the meaning of the State Constitution.

OFFICE AND OFFICER.—Postmaster.—Federal Officer.—Postmasters are Federal officers under the provisions of the State Constitution.

SAME.—Eligibility.—Vacation of Office.—Federal and State Officers.—The

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general rule is that where a man accepts an office held under the State, he vacates another held under the same sovereignty; but where a Federal office is held at the time of the acceptance of an office created by State laws, the former is not vacated by such acceptance. The Federal office may be surrendered and the State office retained, but if the incumbent elects to hold the former, he must surrender the latter.

From the White Circuit Court.

T. F. Palmer and *M. M. Sill*, for appellant.

A. W. Reynolds, *E. B. Sellers* and *D. D. Dale*, for appellee.

ELLIOTT, J.—John G. Kerlin, the appellee, received a majority of the votes cast at an election held on the 7th day of April, 1884, for the office of trustee of Princeton township. The term of the office to which he was elected began on the 14th day of April, 1884, and on that day he entered into the office. At the time he was elected, he was the postmaster at the town of Seafield in that township, and was receiving, as such officer, a compensation of more than \$200 per annum; he did not vacate the office of postmaster, but, on the contrary, he retained it, and was holding it at the time this action was instituted. The facts of which we have given a synopsis are stated formally and at length in the appellant's petition, to which the trial court sustained a demurrer.

Our Constitution contains a provision prohibiting a citizen from holding two lucrative offices, either Federal or State, at the same time. The provision to which we refer reads thus: "No person holding a lucrative office or appointment under the United States, or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as by this Constitution expressly permitted: *Provided*, That officers in the militia to which there is attached no annual salary, and the office of deputy postmaster where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative; and *Provided, also*, That counties containing less than one thousand polls may confer the office of clerk,

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recorder, and auditor, or any two of said offices, upon the same person." There is in our minds no doubt that the Constitution applies to all lucrative National and State offices of whatsoever class, except deputy postmasters whose compensation does not exceed ninety dollars per annum, since any other ruling would render nugatory the plain words of the instrument and make the provision respecting deputy postmasters either meaningless or absurd.

It is quite evident that the framers of the Constitution intended that postmasters should be regarded as Federal officers, but, on principle, independent of the language of that instrument, there can be no contrariety of opinion upon this subject. They are officers within the definition given by the authorities. "An office," says the Supreme Court of the United States, "is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." *United States v. Hartwell*, 6 Wall. 385.

In *Henly v. Mayor, etc.*, 5 Bing. 91, BEST, C. J., said: "In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer." In various forms this definition is given in many cases. *Case of Wood*, 2 Cowen, 29, note; *People v. Common Council*, 77 N. Y. 503 (33 Am. R. 659). But there are cases directly declaring that postmasters are public officers. *Rodman v. Harcourt*, 4 B. Mon. 224; *Hoglan v. Carpenter*, 4 Bush, 89; *Patterson v. Miller*, 2 Met. (Ky.) 493; High Extra. L. Rem., section 95.

In all the decisions upon constitutional provisions similar to ours that we have been able to find, it is laid down for law that one who holds a Federal office, great or small, to which compensation is attached, can not at the same time be lawfully the incumbent of a lucrative office under the statutes of the State. *In re Corliss*, 11 R. I. 638 (23 Am. R. 538);

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State v. De Gress, 53 Texas, 387; *Davenport v. Mayor*, 67 N. Y. 456; *State v. Clarke*, 3 Nev. 566.

If the office of township trustee is a lucrative one within the meaning of the Constitution, the appellee had no right in it while holding the Federal office of postmaster, and that it is a lucrative office is settled by our decisions. *Dailey v. State, ex rel.*, 8 Blackf. 329; *Creighton v. Piper*, 14 Ind. 182; *State, ex rel., v. Kirk*, 44 Ind. 401 (15 Am. R. 239). Both offices the appellee could not hold, and from one or the other he must be ousted.

The State courts have authority to expel him from the office of township trustee, but not from the office held by appointment from the Federal government. Our courts can not decide upon the right of an appointee of the National government, but they can decide upon the right of one asserting a title to an office under the laws of the State. Within the powers delegated to it the Federal government is supreme, and this necessarily carries the authority to determine upon the qualification of its officers and their right to hold office. *Rodman v. Harcourt*, *supra*; *Hoglan v. Carpenter*, *supra*. As our courts have no authority to expel an incumbent from a Federal office, they are powerless to control a man who attempts to defy our Constitution by holding both a Federal and a State office, unless they have authority to expel him from an office held under the laws of the State, notwithstanding the fact that he may have entered into the State office last. We entertain no doubt that our courts do possess power to oust a man from a State office who undertakes to hold it in defiance of our Constitution. This doctrine is ably and decisively declared in the case last cited. If a man persists in clinging to a Federal office, our courts can, and will, compel him to loosen his hold upon an office created by the State. If he perseveres in his effort to violate one fundamental law by holding two offices, the sure penalty will be the loss of that over which the State has jurisdiction. He may, if he will, surrender the Federal office and retain

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that created by the State, but he can not retain both in defiance of the Constitution. If he elects to hold the Federal office he must surrender the State office. The courts will coerce obedience to the Constitution, and will not permit men to hold office in violation of its provisions.

It is, doubtless, the general rule, that where a man accepts an office held under the State, he vacates another held under the same sovereignty. *Dailey v. State, ex rel., supra*; *Lucas v. Shepherd*, 16 Ind. 368; *Creighton v. Piper, supra*; *Howard v. Shoemaker*, 35 Ind. 111; *Cotton v. Phillips*, 56 N. H. 220; *Milward v. Thatcher*, 2 T. R. 81; *People v. Hanifan*, 96 Ill. 420; *Stubbs v. Lee*, 64 Maine, 195; *Shell v. Cousins*, 77 Va. 328.

But the reason of the rule fails when applied to offices held under different sovereignties, and where the reason of the rule fails, so, also, does the rule. There is reason for the rule where the offices emanate from the same government, but none where the offices are created by different governments. The National law neither creates nor governs a State office; neither inducts the officer into office nor expels him from it; neither fixes his qualifications nor prescribes his disabilities. On the other hand, the State law exerts no dominion over the Federal officer as an officer, neither prescribes his qualifications nor declares his disabilities, and it is, therefore, logically inconceivable that the acceptance of an office existing under a State law vacates an office existing under a National law. Where, as here, a man elected to a State office persists in retaining a Federal office, actually remains in it, enjoying its emoluments and discharging its duties, he does not, in legal contemplation, and certainly not in fact, vacate it by entering into an office existing under the laws of the State, and for this plain reason, the laws of the State do not operate upon Federal offices. Our laws do not extend to offices created by the General government, and no act that an officer acting under our laws can do, can vacate an office upon which our laws

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do not operate. Nothing done under our laws can operate where our laws are without effect.

We must hold that a man can be expelled from a State office who persists in holding one given him by the Federal government, or we must concede that the courts of Indiana can not control a citizen who assumes to hold office in direct violation of the Constitution. This concession will not be made.

Judgment reversed.

Filed Jan. 27, 1886.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the brief on the petition for a rehearing appellee's counsel shift the ground upon which they place their cause, and we might, under settled rules, decline to consider the new points made upon the petition for a rehearing, but as the case must go back for further proceedings, we have thought it proper to discuss the questions now presented.

What we decided in the original opinion is, that the complaint makes a *prima facie* case for the contestant, that is, it shows the ineligibility of the appellee to enter into the office of township trustee at the time his term of office began. Whether he can successfully defeat that case was not the question before us, and, of course, no decision upon that question was made. It may be that the appellee can show by answer that he removed the cause of his ineligibility by resigning the office of postmaster, but that question can not now be decided, for it can not arise until there is an answer presenting it.

The complaint demurred to by the appellee shows that he was not eligible to enter into the office to which he was elected, and that he claims the office, thus showing a *prima facie* cause of action, for we think it quite clear that a voter may challenge the right of an ineligible person to hold office. The statute expressly so provides.

The cases cited by counsel are not at all in point, except, perhaps, that of *Searcy v. Grow*, 15 Cal. 117, which is very

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strongly against the appellee, for it goes much further than we have done, as it holds that an incumbent of the office of postmaster is ineligible to be voted for at the election. We are simply required to decide that if a person chosen to office is shown to be ineligible at the time when he ought to be inducted into office, such a case is made as at least drives him to answer.

Petition overruled.

Filed March 6, 1886.

No. 12,629.

THE FIRST NATIONAL BANK OF MAUCH CHUNK v. THE UNITED STATES ENCAUSTIC TILE COMPANY ET AL.

RECEIVER.—*Appointment by Judge in Vacation.*—*Insolvent Corporation.*—Under section 1222, R. S. 1881, a judge in vacation may appoint a receiver for a corporation which is in "imminent danger of insolvency."

SAME.—*Answer Admitting Complaint.*—*Adversary Proceeding.*—Upon the filing of a complaint against such a corporation, alleging such cause for the appointment of a receiver, an answer admitting the truth of the complaint does not make the suit less adversary in character than it otherwise would be.

SAME.—*Voluntary Appearance of Defendant.*—The voluntary appearance of the defendant in such proceeding is equivalent to the service of process, and the suit is commenced and pending at and from the time of such appearance. Sections 315 and 1230, R. S. 1881.

SAME.—*Validity of Proceeding in Vacation.*—*Collateral Attack.*—The court having jurisdiction of the subject-matter of the suit and of the parties, the proceedings and orders of the judge in vacation are the proceedings and orders of the court, and, even if erroneous, are not void, and can not be collaterally attacked.

MITCHELL, J., dissents.

From the Marion Superior Court.

F. Winter, J. S. Duncan, C. W. Smith and J. R. Wilson, for appellant.

A. C. Harris, W. H. Calkins, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker and E. Daniels, for appellees.

105	227
184	310
105	227
139	471
105	227
145	549
105	227
159	20
159	76
159	79

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Howk, J.—This was a suit by the appellant, as sole plaintiff, against the appellees, the Encaustic Tile Company and John L. Mothershead, as the receiver of such company, as defendants. The separate demurrer of the Encaustic Tile Company to the appellant's complaint, for the alleged want of facts therein to constitute a cause of action, was sustained by the court at special term. The appellee Mothershead separately answered in a single special paragraph, to which the appellant's demurrer, for the alleged want of facts, was overruled by the court in special term. The appellant refused to amend its complaint as against the tile company, or to reply to the answer of Mothershead; and thereupon the court at special term adjudged that appellant take nothing by its suit herein, and that the appellees recover of it their costs. On appeal, the court in general term affirmed the rulings and judgment of the court at special term, and from the judgment of the general term appellant brought its case by appeal to this court.

By a proper assignment of error, the appellant has presented here the same errors of which it complained in the court below in general term, namely:

1. The sustaining of the demurrer of the Encaustic Tile Company to its complaint.
2. The overruling of its demurrer to the answer of Mothershead.

We will first consider the second of these alleged errors. It may be premised that the appellant was an execution creditor of the United States Encaustic Tile Company, an insolvent corporation, and that the object of its suit was to have the court declare void and vacate the orders of the Honorable Lewis C. Walker, one of the judges of such court, in vacation, in the appointment of a receiver for such corporation, and to subject the real and personal property of the corporation, in the hands of such receiver, to levy and sale under appellant's execution.

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In his answer, the appellee Mothershead said that it was true, as charged in the complaint, that the United States Encaustic Tile Company was, and long prior to July 24th, 1884, had been, a manufacturing corporation, organized and existing under the laws of the State of Indiana, engaged in the manufacture of tiles, with its office, factory and place of business in the city of Indianapolis, and that on said day such corporation was largely indebted to the persons named in the complaint and others, and was insolvent, and held real estate, whereon its factory was located and carried on, of great value, and had notes and accounts owing to it, and contracts in progress of fulfilment and performance in making and laying tiles, and was doing a large business; that it was also true that, on said day, Douglass, Dunlap and Pattison, the first two being stockholders and the last a general creditor of such corporation, filed in the clerk's office of the court below their joint complaint against such tile company, which complaint was then and there received by the clerk, numbered and docketed upon the records of such court in his office, and endorsed "filed July 24th, 1884," and placed upon the files of such court, and (omitting the venue and title of the cause) was as follows:

"The plaintiffs, James G. Douglass, John Dunlap and Isaac N. Pattison, complain of the defendant, the United States Encaustic Tile Company, and say that the plaintiff Douglass is the owner of four hundred and seventy-four shares of the capital stock of the defendant; that plaintiff Dunlap is the owner of twenty-five shares of the stock of such defendant; that the plaintiff Pattison is the owner and holder of three promissory notes, of \$5,000 each, made and issued by the defendant; that the defendant is a corporation, created under the laws of the State of Indiana, and having its place of business at the city of Indianapolis, in such State, where it is engaged in the manufacture of tile; that the defendant is indebted in a large sum of money, to wit, \$200,000, to divers persons; that more than \$100,000 of such indebted-

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ness is in the form of commercial paper, some of which has matured and is unpaid; that the defendant is unable to pay its matured paper and will be unable to meet, in the due course of business as it matures, its other outstanding notes, and is in imminent danger of insolvency; that such corporation is now employing a large number of hands in the manufacture of tile; that it has many valuable contracts outstanding, and has on hand a large stock of manufactured tiles; that it would be very disastrous to the business of such corporation and to its creditors and stockholders, if the operations of its factory should be stopped; that, if a receiver is not appointed to take charge of its assets, the same will be wasted and dissipated by sales upon execution and large amounts of unnecessary costs, and the interests of the creditors sacrificed. Wherefore the plaintiffs pray that a receiver may be appointed to take charge of the books, property and assets of every kind of the defendant, and apply the same under the direction of the court to the liquidation of the debts of the company, and that he may be authorized, until the further order of the court, to continue the business of the company. (Signed) R. O. HAWKINS,

"Attorney for Plaintiffs."

Appellee Mothershead further said that it was true, that at the time of the filing of such complaint the court was not in session, but in vacation, and there was no called or special session or term of the court being held, but the Honorable Lewis C. Walker, on said day, long before and ever since one of the judges of the court, was then sitting in his chambers, in the court-house of Marion county; that it was true also, that the clerk did not, upon the filing of such complaint, issue any summons or other judicial process, over his hand and seal, to the sheriff of Marion county; but after the complaint was filed and docketed, and without any process being issued, the defendant corporation, by its attorneys duly employed and authorized, filed with the clerk of the court below, in his office, its answer to the complaint of Douglass,

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Dunlap and Pattison (omitting venue and title of the cause), in substance, as follows:

"The defendant, the United States Encaustic Tile Company, for answer to the complaint in the above cause, admits the allegations thereof and confesses that a receiver ought to be appointed. (Signed) HARRISON, MILLER and ELAM,

"Attorneys for Defendant."

And appellee Mothershead further said, that the foregoing answer of such corporation was so filed by its attorneys, for it and by direction of its officers, for the purpose of waiving the issuance of process and then and there appearing to the action, and of securing and placing the property of the corporation in the custody of the law, for the equal protection and benefit of all the creditors of such insolvent corporation, and because it could not gainsay or deny the facts in such complaint, nor resist the relief asked, because the facts therein stated were true, and the proceedings were had in good faith; that it was further true that, in pursuance of the purpose aforesaid, the plaintiffs Douglass, Dunlap and Pattison, by R. O. Hawkins their attorney, and Douglass in person, and the aforesaid attorneys of the defendant corporation, and one Lyon, the secretary and treasurer, and at the time principal acting officer of such corporation, did, on the day aforesaid, go before Judge Lewis C. Walker, of the court below, and presented and submitted to such judge, then sitting in his chambers aforesaid, the foregoing complaint and the matters and facts set forth therein, and the foregoing answer and the admissions and confessions contained therein; that Judge Lewis C. Walker, upon the investigation and hearing then and there made and had by and before him, in the presence of the parties plaintiffs and defendants, so appearing before him as aforesaid in his chambers, being satisfied that such proceeding was instituted and was being prosecuted in good faith, and that the defendant corporation was insolvent, was largely indebted, had a large amount of manufactured stock and stock in process of manufacture on hand, with a valua-

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ble business, factory and establishment, all in Marion county, and that the law required that he should take custody and control of all the property of such corporation, and hold and administer the same for the benefit of its creditors and distribute the same equally amongst all, in such action, as their rights might thereafter be settled on final decree, did then and there, as fully as he lawfully might, take jurisdiction of the parties and of the property of such insolvent corporation, and having acquired such jurisdiction, did then and there make an order nominating and appointing the appellee Mothershead receiver of such insolvent corporation and of its property, and prescribing his powers and duties as such receiver, and did then and there cause his order and decree to be entered of record, in the proper order-book of such court, which entry of record such judge then and there signed. A duly certified copy of such order and decree of Judge Walker, and of the bond and oath of such receiver, is set out at length in the body of this answer in this cause.

The appellee Mothershead further said that, upon the making of the order and decree appointing him as such receiver, he accepted such appointment, and qualified and gave bond as required; that thereupon he, as such receiver, in obedience to such order, did then and there take into his possession, and under his control, as fully as he lawfully might, all and singular, the property of any and every kind, owned and held by such corporation, both real and personal, and so kept and held possession thereof at all times since until the filing of this answer, except only that, under subsequent orders and directions of such court and judge, he had from time to time sold large quantities of manufactured tiling and collected large sums of money therefor, and also on notes and accounts owing such corporation at the time of his appointment, and had expended large sums of money on and in conducting such business, which had been kept running actively at all times since his appointment, and had bought materials and the like, and manufactured new tiling, some of which he had since sold

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and some of which yet remained on hand for sale ; that it was true that the body of the complaint and the body of the answer, in the above described cause, were in the handwriting of the same person, but such person was a stenographer to whom the pleadings were dictated, who afterwards wrote them out, and the complaint was then signed by the plaintiff's attorney and the answer was signed by the defendant's attorneys, in their own proper hands, respectively.

And appellee Mothershead further said that afterwards, on September 10th, 1884, he, as such receiver, filed in such court and cause his petition, praying for an order of the court to pay certain secured debts of such tile company, existing before and at the time of his appointment, which petition was by the court, then in session, received from him as such receiver ; and such proceedings were had that afterwards, on September 13th, 1884, such court, being in session, heard and allowed such petition, and made and entered of record an order thereon in said cause. A certified copy of such order is set out in, and forms a part of, appellee's answer in this cause.

Appellee Mothershead further said that it was true that the several persons named in appellant's complaint, except said McCarty, did recover the several judgments, at the times, for the amounts and in the courts, in such complaint stated, and did cause executions to be issued, which came to the hands of the sheriff of such county at the dates therein set forth ; and he admitted that the proceedings set out in the complaint herein, as had in such action and proceeding on May 19th, 1885, were correctly set forth therein ; but he averred that the proceedings theretofore had were not null and void ; that the proceedings, had on May 19th, 1885, did not set aside, vacate, annul or destroy, in any manner, the prior proceedings, or, in any way, make such judgments or executions, or any of them, liens upon any of the property then and since held by him as such receiver ; and that, upon being informed of the making and entry of such order of May 19th, 1885,

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he fully complied therewith ; that it was true he claimed the right to hold and sell such property, as alleged in the complaint, because he was required to obey the orders and directions of the court, whose officer he was ; and that such court did, on the — day of ———, 1885, make in such cause an order, entered of record in the proper order-book of such court and signed, directing him as such receiver, upon the terms therein stated, to sell the real estate and factory of such corporation, together with all the stock on hand and the like, as a going concern, which order yet remained, unrescinded and in full force ; that it was true that, upon the sheriff demanding of him the right to levy such executions upon such personal property, for the purposes and at the time stated in the complaint, he did then and there refuse to permit the same to be done, and had at all times since and still refused, because, as he was advised, such judgments and executions never became liens upon any of the property, real or personal coming to his hands and then and there held by him, as such receiver, because such property at the time of the rendition of such judgments, and of the issuance of such executions, was in the custody of the law, and no longer subject to execution and sale, as he was advised ; that the facts alleged in appellant's complaint were true, except as otherwise stated in this answer, and, where otherwise stated herein, then the truth was as they were set forth in this answer, and not otherwise ; and that the judicial proceedings, mentioned in such complaint, were the same proceedings in the same cause, mentioned and described in this answer, and none other or otherwise. Wherefore, etc.

In its complaint herein the appellant, the First National Bank, etc., set up the institution of the suit of *James G. Douglass et al. v. United States Encaustic Tile Co.*, in the Marion Superior Court, in vacation, and the appearance of the parties to such suit, plaintiffs and defendant, by their respective attorneys, before Judge Lewis C. Walker, one of the judges of such court, sitting in chambers in the vacation of

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his court, on the 24th day of July, 1884, and the application then and there made, upon the plaintiff's complaint and the defendant's answer filed in such suit, for the appointment of a receiver therein, and the acts, orders and proceedings, then and there had, made and done by and before Judge Walker, in the vacation of his court, in such suit, and the appointment then and there of appellee Mothershead as such receiver, his acceptance of such trust, his qualification as such receiver, and his taking possession of the property and assets of such insolvent defendant corporation. All these facts were stated by appellant in its complaint, substantially as the same are stated by appellee Mothershead in his answer; and it was upon these facts appellant based its cause of action, and demanded the relief it sought herein. The theory of appellant's complaint herein, as we understand it, was that the proceedings had, and orders made, by and before Judge Walker, in the vacation of his court, on the 24th day of July, 1884, in the suit of *Douglass et al. v. U. S. Encaustic Tile Co.*, were void for two reasons, namely: 1. Because the suit in question was not an adversary suit, as between the parties thereto; and, 2. Because the voluntary appearance of the defendant corporation, by its attorneys, could not and did not give Judge Walker, sitting in chambers in the vacation of his court, jurisdiction of the suit as a pending suit, or of the person of such corporation.

Section 1222, R. S. 1881, in force since September 19th, 1881, specifies a number of cases wherein a receiver may be appointed by the court, or the judge thereof in vacation. In some of these cases it is manifest that the appointment of a receiver is, and was intended to be, merely an ancillary proceeding in a pending suit, for the purpose of placing property, which is the subject of the litigation, *in custodia legis* until the suit is determined, and the rights of the parties are ascertained. In some of the cases specified, however, provision is made for the appointment of a receiver by the court or the judge thereof in vacation, where such an appointment

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is the only purpose of the suit, and the only relief demanded therein. Thus, the section cited provides, that a receiver may be appointed by the court, or the judge thereof in vacation, "When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights." It was under this clause of the section of the code that Douglass and others commenced their suit against the Encaustic Tile Company; and they alleged in their complaint facts which showed that the defendant corporation was in imminent danger of insolvency, and the further fact that it was in such danger. These were issuable facts, which the corporation had the right either to admit or to deny, and the fact that it filed an answer admitting the truth of the complaint does not make the suit of the plaintiffs therein any the less of an adversary character than it otherwise was.

The effect of the voluntary appearance of the defendant in such a suit as this, brought for the purpose of obtaining the appointment of a receiver, before the judge of the court wherein the suit was brought, sitting in chambers in vacation, was considered by this court in *Pressley v. Lamb*, *ante*, p. 171. It was there held that such voluntary appearance is equivalent to the service of process in the suit, and that such suit is commenced and pending at and from the time of such voluntary appearance. Sections 315 and 1230, R. S. 1881. It was further held in the case cited, that the court having jurisdiction of the subject-matter of the suit, and of the parties thereto, plaintiffs and defendants, the proceedings had and orders made by and before the judge of the court, in vacation, were the proceedings and orders of the court whereof he was judge; and that such orders and proceedings, even though erroneous, were not void, and could not be collaterally attacked. *Cook v. Citizens Nat'l Bank*, 73 Ind. 256; *Howard v. Whitman*, 29 Ind. 557.

The case of *Pressley v. Lamb*, *supra*, we think, settles the question that the facts stated in appellant's complaint in the case under consideration are not sufficient to constitute a cause

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of action against appellee Mothershead. This being so, it is manifestly immaterial whether Mothershead's answer was good or bad. *Fell v. Muller*, 78 Ind. 507. We are of opinion, however, that such answer stated a full and complete defence to appellant's cause of action.

We find no error in the record. The judgment is affirmed, with costs.

MITCHELL, J., dissents.

ELLIOTT, J., took no part in the decision of this cause.

Filed Jan. 30, 1886.

No. 12,364.

HEBERD v. WINES ET AL.

NEW TRIAL AS OF RIGHT.—*Motion after Term.*—*Practice.*—A motion for a new trial as of right, under sections 1064 and 1065, R. S. 1881, although made at a term subsequent to the rendition of the judgment, need not show specifically the rendition of such judgment, the time of the same, nor that the undertaking had been filed, the record otherwise showing such filing.

SAME.—*Motion Must be Well Taken as a Whole.*—There is no available error in overruling motions and objections where they are not well taken as a whole.

HUSBAND AND WIFE.—*Trusts.*—*Quieting Title.*—*Judgment.*—Where a husband receives and uses money belonging to his wife, with the understanding that it is to be returned to her, with interest, and subsequently real estate is purchased and paid for by the husband under an agreement that it is to belong to the wife as an equivalent for her money and interest, but, by mistake and without her knowledge, the deed is made to the husband, she is entitled to have her title quieted as against a judgment creditor of the husband.

JUDGMENT.—*Lien of.*—*Prior Equities.*—Judgments are merely general liens upon whatever interest the judgment debtor may have in lands, and are not available against the enforcement of prior equities therein.

SAME.—*Real and Apparent Interest in Land.*—A judgment creditor will not be heard to say that parties, having the one a real and the other an apparent interest in land, shall not do equity as between themselves, merely

105	237
128	57
105	237
131	204
105	237
137	220
105	237
150	390
152	261

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because one might not have been able to coerce the doing of the right thing by the other.

From the Greene Circuit Court.

W. A. Cullop, G. W. Shaw, C. B. Kessinger, A. G. Cavins, E. H. C. Cavins and W. C. Cavins, for appellant.

E. E. Rose, E. Short, J. D. Alexander and H. W. Letsinger, for appellees.

ZOLLARS, J.—Appellee Morrison brought this action against appellees Wines and Wines, and appellant, to quiet the title to certain lots in Bloomfield.

He alleged in his complaint that, in addition to other sources of title, he derived title through a sale by the auditor for delinquent taxes. Appellant filed a cross complaint against Morrison and Wines and Wines, in which he set up that, on the 22d day of October, 1873, he recovered a judgment against appellee William Wines; that at the time the judgment was rendered, and until the sale for taxes, and the purchase by Morrison in 1881, said Wines was the owner of the lots in controversy, and that hence the judgment was a lien thereon. He asked that his judgment might be declared to be a lien upon the lots, prior to any legal or equitable claim by William Wines or his wife, Nancy J. Wines.

William Wines filed an answer to this cross complaint, but it is not in the record. Nancy J. Wines filed a separate answer to appellant's cross complaint, and also a cross complaint against appellant Morrison and her husband, William Wines. In her cross complaint, as well as in one paragraph of her answer, she set up that she was the real and equitable owner of the lots; that her husband purchased them for her, and paid for them with her money, which came to her from her father's estate; and that without her knowledge and consent, and by mistake, the deed for the lots was taken in the name of her husband. She asked that her title to the lots might be quieted as against the claims of the other parties to the action. The case, having been put at issue by answers and

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replies, was submitted to the court for trial. The court found against Nancy J. upon her cross complaint; that Morrison had no title to the lots, but was entitled to a first lien for the amount paid by him at the tax sale; that the judgment in favor of appellant was a lien upon the lots junior to that in favor of Morrison, but superior to any claim by William Wines or Nancy J. Wines, except such interest as she might have as the widow of her husband, should she survive him. Judgment was rendered accordingly.

At the next term of the court Nancy J. and her husband filed a motion for a new trial as of right under the statute. R. S. 1881, sections 1064, 1065. This motion was sustained, and a new trial granted.

At the succeeding term appellant filed a motion to set aside the order granting a new trial. This motion was overruled, and he excepted.

The contention by appellant is, that the new trial was improperly granted, for two reasons. The first is that the written application, or motion therefor, having been made at a term of the court subsequent to the rendition of the judgment, should have more definitely shown the rendition of the judgment, the time when rendered, and that the proper undertaking had been filed, although the record otherwise shows the filing thereof. In support of this contention the case of *Crews v. Ross*, 44 Ind. 481, is cited.

The case of *Physio-Medical College v. Wilkinson*, 89 Ind. 23, is a complete answer to this contention. In that case the case of *Crews v. Ross*, *supra*, was disapproved.

The second reason relied upon is that the motion for a new trial was a joint motion by William Wines and Nancy J. Wines; that William Wines was not entitled to a new trial as of right, and that, therefore, the joint motion by him and his wife was improperly sustained.

The argument that appellant applies to the ruling of the court applies with more force to his motion to set aside the order granting a new trial. It is clear that Nancy J. Wines

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was entitled to a new trial as a matter of right. This is conceded. Appellant's motion to set aside the order granting a new trial was not limited to so much of the order as granted a new trial to William Wines. It was directed to the whole order, which embraced also the granting of a new trial to Nancy J. Wines. As to her, the motion to set aside the order was not well taken, and was properly overruled. It was not an available error, therefore, to overrule appellant's motion for the setting aside of the whole of the order granting a new trial.

There is no available error in overruling motions and objections, where they are not well taken as a whole. *Feeney v. Mazelin*, 87 Ind. 226; *Robertson v. Garshwiler*, 81 Ind. 463; *Elliott v. Russell*, 92 Ind. 526; *Carver v. Carver*, 97 Ind. 497; *Wolfe v. Pugh*, 101 Ind. 293; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409.

There was no error that appellant can make available, in the overruling of his motion to set aside the order granting a new trial. It would have been of but little consequence to appellant to have the order granting a new trial set aside as to William Wines, and not as to Nancy J. Wines, because, if she was the owner of the lots, his judgment was not and could not be made a lien upon them.

Upon the second trial, the court rendered a personal judgment against William Wines, in favor of appellant, for the amount of his claim, found and adjudged that Nancy J. Wines was and had been the real owner of the lots, and quieted her title thereto, subject to the claim and lien in favor of Morrison for the amount of taxes paid by him.

Appellant's motion for a new trial, and his assignment of errors in this court, alleging error in the overruling of that motion, call in question the sufficiency of the evidence to sustain the finding and judgment of the trial court.

The evidence tends to establish the following facts: William and Nancy J. Wines were married in 1856. Shortly after that, Nancy J. received from her former guardian, and

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from her grandfather's estate, \$875, mostly gold coin. This money passed into the hands of the husband, who purchased a farm and used the money in paying for it, telling his wife that he would settle with her. He sold this farm and bought another with the proceeds. At this time, the wife, Nancy J., insisted that something should be settled upon her, and in her name, as an equivalent of her money used by the husband. She often made the same demand. During this time and subsequently, there was an understanding that the husband should not only account to the wife for her money, but also for interest thereon. In 1869, her money, with accumulated interest, amounted to about \$2,000. In that year, the property in controversy was purchased at an agreed price of \$1,500. The negotiations for the purchase of the property were carried on by the husband and wife. The understanding between them and the vendor was, that it was purchased for the wife, and that the deed should be made to her. The agreement between the husband and wife was, that the property should be hers, as an equivalent of the money the husband had received from her, and the accumulated interest thereon. The deed, however, was made to the husband. How this happened is not very satisfactorily explained. The evidence creates a strong inference that it was by the mistake of the scrivener, or the neglect of the parties to properly direct him. The wife did not know of this mistake for more than a year after the deed was made. Five hundred dollars was paid at the time the deed was made, and the husband executed to the vendor his two notes of \$500 each, secured by a mortgage upon the property. One of the notes was afterwards paid. These payments were made by the husband, but for the wife, as a means of returning to her what he had received from her. The second note was assigned by the vendor and payee. The assignee required a new mortgage to be executed by both William and Nancy J. Wines. This was executed in 1871. The note not having been paid

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at maturity, the mortgage was foreclosed in 1874, and the property sold. Before the expiration of the year allowed for redemption, the certificate of purchase was bought and assigned to the wife, Nancy J. Wines. Here again the husband furnished the money for her, for the purpose of saving the property for her and as a means of returning to her what he had received from her. At the time the property was purchased and the first payment made, the husband, William Wines, was solvent, and, so far as shown by the evidence, was solvent when the other payments were made.

Under this evidence, we think it clear, that Nancy J. Wines was the real and equitable owner of the lots, from the time of the purchase, although the legal title was lodged in the husband. Her money paid for the lots. The payments by the husband were just as much payments by her as if he had first refunded the money to her and she had paid it over to the vendor. By the understanding and agreement of the parties, the lots were hers. William Wines had no present interest in them, although the legal title was in him. The legal title would have been in Nancy J. but for a mistake or oversight.

It is settled in this State, that judgments are simply general liens upon whatever interest the judgment debtor may have in lands, and no more; that such liens do not stand in the way of the enforcement of prior equitable interests in such lands, and that when the judgment debtor has no interest except the naked legal title, the lien of a judgment does not attach. *Hays v. Reger*, 102 Ind. 524, and cases there cited; *Boyd v. Anderson*, 102 Ind. 217, and cases there cited; *Foltz v. Wert*, 103 Ind. 404; *Wright v. Jones*, *ante*, p. 17.

The lots having been paid for with the money of Nancy J., and the agreement having been that she should have the deed, and be the owner of the lots, it was the duty of William Wines, after the mistake in the deed was discovered, to have conveyed the legal title to her. If he had performed that duty, appellant, as a judgment creditor simply, could

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not have been heard to complain or object. In such a case, it would not have been necessary to inquire as to whether or not, by reason of the statute of frauds, or for any other reason, Nancy J. might have coerced such a conveyance. *Bremmerman v. Jennings*, 101 Ind. 253. He did not make a conveyance, but the court below accomplished the same thing, by adjudging Nancy J. to be the owner of the lots, and quieting her title thereto. It accomplished, in effect, what should have been voluntarily done by William Wines. Of that judgment, he makes no complaint. Appellant, as a judgment creditor simply, can not make complaint for him. A judgment creditor can not interpose and defeat a prior equity in the land. He will not be heard to say, that parties having a real and apparent interest in the land shall not do equity as between themselves, simply because one might not have been able to coerce the doing of the right thing by the other. See the cases last above cited.

The motion for a new trial was properly overruled.

It is further contended that the court below erred in overruling appellant's motion to arrest the judgment upon the cross complaint of Nancy J. Wines. We think otherwise. In her cross complaint she alleged, amongst other things, that she was the real and equitable owner of the lots; that the other parties were claiming an interest therein and thereto adverse to her, and asked that her title to the lots might be quieted as against their claims. See *Burt v. Bowles*, 69 Ind. 1.

The judgment is affirmed, with costs.

Filed Jan. 28, 1886.

No. 12,389.

RALSTON v. MOORE.

PARTNERSHIP.—*Action against Surviving Partner.*—*Decedents' Estates.*—Upon the death of one of two joint debtors, the creditor has a right to collect his claim, at law, from the survivor, or, at his option, proceed un-

105	243
131	238
105	243
138	596
105	243
157	129
105	243
165	175

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der the statute in regard to the settlement of decedents' estates, against the estate of the deceased.

SAME. Plea in Abatement.—Jurisdiction.—Promissory Note.—To a suit on a promissory note executed by a partnership in the firm name, against the surviving partner, a plea in abatement is insufficient which alleges that the defendant and one R., as partners, executed the note in suit; that afterward the defendant withdrew from the firm, leaving in R.'s hands ample means to pay all the firm debts, including the note; that afterwards R. died, and the administration of his estate is still pending; that there are ample means belonging to the estate to pay the debts, including the note, which has never been presented to the administrator or filed against the estate, and that the administrator has not been made a party to the suit, wherefore the court has no jurisdiction.

PRACTICE.—Pleading.—Non est Factum.—Harmless Error.—It is a harmless error to sustain a demurrer to an unverified answer of *non est factum*, where the general denial, pleaded with it, remains.

EVIDENCE.—Exclusion of.—Practice.—Where no question was asked a witness, nor anything else done in that connection, except to propose to the court to prove certain recited facts, no question is presented in regard to the exclusion of his testimony.

From the Marion Superior Court.

I. Klingensmith and W. P. Adkinson, for appellant.

P. W. Bartholomew, for appellee.

MITCHELL, J.—This was a suit on a joint and several promissory note, dated January 13th, 1875, payable to Isaac Moore, due one day after date, and signed "J. & D. A. Ralston." The action was originally brought against David A. Ralston and J. Ralston. Before the issues were completed it was dismissed as to the latter.

David A. Ralston pleaded in abatement, in effect that during the years 1872 and 1873 he and one John Ralston were partners, under the firm name of "J. & D. A. Ralston," and that the note was given by them jointly; that afterwards the defendant withdrew from the firm, leaving in the hands of John Ralston, the continuing member of the late firm, ample means to pay all the partnership debts, including the note sued on, and that the consideration of the note was received principally by John Ralston, who, it is averred, died in Owen county on the 21st day of April, 1882. The answer alleges

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that the administration of the estate of John Ralston, deceased, is still pending in Owen county, and that there are ample means belonging to the estate with which to pay all the debts, including the note, which it is averred has never been presented to the administrator or filed against the estate. Because this has not been done, and for the reason that the administrator is not made a party, it is alleged, the superior court has no jurisdiction, and the prayer is that the action may abate.

A demurrer was sustained to this plea, and it is now claimed that by force of the statute regulating the manner of enforcing claims against executors and administrators, this ruling was erroneous.

The statute referred to, section 2311, R. S. 1881, provides, in effect, that no action shall be brought by complaint and summons against any executor or administrator, upon any contract, etc., but the holder of such contract shall enforce it against the estate only by filing his claim in the manner provided in the preceding section.

It is also claimed by counsel that section 2312, R. S. 1881, exerts some influence favorable to his view. This section enacts that every contract executed jointly by a decedent, with any other person, shall be deemed joint and several, for the purposes contemplated in the section above referred to, and the amount due on such contract shall be allowed against the estate of the decedent, as if the contract were joint and several.

If this suit had been against the personal representative of the deceased partner, and the plea in abatement had been filed on his behalf, the application of the statutes referred to might be apparent. As, however, the action was against the survivor, we think the statutes relied on have no application whatever to the case.

Upon the death of one of two joint debtors, the creditor has a right to collect his claim at law from the survivor, or, at his option, proceed as the statute points out, against the estate of the deceased. *Kimball v. Whitney*, 15 Ind. 280.

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That assets of the firm, sufficient to pay the debts, were left in the hands of the deceased partner at the time the partnership was dissolved, was immaterial. The defendant remained liable until the debt was paid. The plea in abatement was clearly insufficient.

After the demurrer to the plea in abatement was sustained, the defendant filed an answer in four paragraphs, the first of which was a general denial, and the second an unverified plea of *non est factum*. Sustaining a demurrer to the second plea is complained of as error.

While it is true, as counsel contend, the defect, that a plea of *non est factum* is not verified, can not be reached by demurrer, yet, as such a plea without verification is the equivalent of the general denial, and nothing more, and as the general denial and the plea purporting to be an answer of *non est factum* were pleaded together, it was a harmless error to sustain a demurrer to the one while the other, under which exactly the same evidence was admissible, remained. *Wade v. Mussleman*, 14 Ind. 362; *Hill v. Jones*, 14 Ind. 389; *McNeer v. Dipboy*, 14 Ind. 18; *Newby v. Rogers*, 54 Ind. 193; *Unthank v. Henry County T. P. Co.*, 6 Ind. 125; 1 Works Pr., section 635; *Fuller v. Wright*, 59 Ind. 333; 1 Works Pr., section 537.

We are reminded that it was said by this court in *Boots v. Canine*, 94 Ind. 408, that pleadings not sworn to shall have the same effect as pleadings sworn to. That is true as applied to the subject there under discussion, and perhaps under all other circumstances except where the execution of a written instrument is denied. *Hunter v. Probst*, 47 Ind. 359; *Bradley v. Bank, etc.*, 20 Ind. 528.

Substantially the same facts were pleaded in bar of the action in the third paragraph of answer as those set up in the plea in abatement, which have already been considered. For the reasons suggested in that connection, the demurrer to the third answer was properly sustained. The case of *Warren v.*

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Farmer, 100 Ind. 593, is in no sense applicable to the facts presented by the answer.

The only other error which has not been impliedly waived relates to the ruling of the court in excluding certain evidence.

A bill of exceptions recites that the defendant proposed to prove by a witness, whose name is given, substantially the facts which were pleaded in the third paragraph of answer, to which the court had, as we have seen, properly sustained a demurrer. The evidence was in itself incompetent. Moreover, as no question was asked the witness, or anything else done in that connection, except to propose to the court to prove certain recited facts, no question is presented. *Higham v. Vanosdol*, 101 Ind. 160, and cases cited.

The judgment is affirmed, with costs.

Filed Jan. 28, 1886.

No. 12,104.

LOWE ET AL. v. BRANNAN ET AL.

106	247
143	147
106	247
155	420

HIGHWAY.—*Appeal from Commissioners.—Special Finding.*—Upon appeal from the action of a board of commissioners in a proceeding for the improvement of a highway, it is not necessary that the circuit court, in a special finding, should set out the steps taken in the case before the commissioners.

SAME.—*Improvement of Existing Way.—Petition.*—Under a petition asking for the improvement of an existing highway, a new way can not be laid out. The order must be for such a way as the one described in the petition, without material departure from the existing line.

SAME.—*Description.*—Petitioners for the improvement of an existing highway must describe it with fair and reasonable certainty. It is not sufficient to describe it as it will exist if the improvement is made.

From the Carroll Circuit Court.

A. W. Reynolds and *E. B. Sellers*, for appellants.

D. D. Dale, for appellees.

Lowe et al. v. Brannan et al.

ELLIOTT, J.—The appellants prosecute this appeal from the judgment of the circuit court, rendered in a case appealed from the commissioners' court, ordering that a highway be improved by straightening, grading and draining.

It is contended that the court erred in its conclusions of law, and one of the arguments advanced in support of this contention is, that the court did not state specifically in its special finding what steps were taken before the board of commissioners. We can not concur in the view of counsel. In our opinion it is not only unnecessary to set out the proceedings in detail in the special finding, but it would be improper to do so. Evidence is not to be stated in a special finding; facts only should be set forth. As it is the facts, and not the evidence that should be stated, it is certainly sufficient (if, indeed, so much be necessary or even proper) to state generally the steps taken in the commissioners' court. The doubt in our minds is whether it is even proper to state generally these matters in the special finding, for it seems to us that the facts which should be stated are such only as it is necessary to prove upon the trial. Whether the requisite preliminary steps have been taken, is for the court to determine from the record, for this is a question of law and not of fact. We are strongly inclined to the opinion that it is neither necessary nor proper to embody in a special finding a statement of the petition or of the orders of the commissioners, or like matters. If the case were submitted to a jury and a special verdict required, it would not be necessary to incorporate such matters in the verdict, and the same rule must apply to a special finding.

The petition prays for the improvement of a county road, and professes to describe it; while the special finding states that "There is no public highway on the line of said proposed improvement from the north end of Market street, in the town of Monon, to the section line, and thence east to the east side of the right of way of the Louisville, New Albany and Chicago Railroad, nor is there a public highway on

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the line of said proposed improvement across Monon creek, and for one-fourth of one mile on each side of said creek, nor for one-half mile on the east end thereof next to the Tippecanoe river; that there is a public highway beginning at the south end of Market street, in said town of Monon, and extending eastward to the east side of the right of way of the Louisville, New Albany and Chicago Railroad; thence north to the section line; thence east to near Monon creek; north half a mile; thence east across Monon creek; thence south to section line; thence east to within a half mile of Tippecanoe river; that from the north end of Market street to the section line is about forty rods, and from that point east to the east side of the Louisville, New Albany and Chicago Railroad, is about twenty rods."

The petition does not ask for the location of a new way, but professes to describe an existing way, and the prayer is that it may be improved by straightening, grading and draining. It is clear that under a petition asking for the improvement of an existing highway, a new way can not be laid out. *Com. v. Cambridge*, 7 Mass. 158. The order for the location of the highway must be for such a way as the one described in the petition. *People v. Township Board, etc.*, 12 Mich. 434; *Brannan v. Mecklenburg*, 49 Cal. 672; *Damrell v. Board, etc.*, 40 Cal. 154; *Robinson v. Logan*, 31 Ohio St. 466.

An unimportant deviation from the line described would not vitiate the proceedings, but a material departure from the line described, or a change in the character of the thing petitioned for, would, in a direct attack, undoubtedly be cause for avoiding the proceedings.

In this instance there is a material difference between the thing petitioned for, and the thing ordered by the court. The petition professes to describe an existing highway, and asks that it may be improved; but, as the finding shows, instead of describing the highway as it exists, it describes the highway as it will exist if the improvement is made. Petitioners who seek to improve an existing highway by straightening

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and grading must describe it with fair and reasonable certainty, for it is not sufficient to describe the highway as it will exist if the improvement should be ordered.

We have no doubt that upon a petition describing an existing highway, and praying for its change or improvement, the court may order the road to be laid out upon new ground, provided no material departure is made from the line of the existing highway. *Gipson v. Heath*, 98 Ind. 100. But, where the proceeding is to straighten or improve a highway, a new line can not be laid out or opened; the court can do no more than order that the existing road be improved. Here the court directed a highway to be opened where there is now none, and in this departed from the petition in a very material particular, for the petition does not ask for the opening of a new way, but simply asks the improvement of an old one. So, too, the court did not direct the improvement of an existing highway as described in the petition, for there is really no such highway described.

The judgment is reversed, with instructions to sustain the appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

Filed Jan. 28, 1886.

No. 12,703.

HOCKETT v. THE STATE.

TELEPHONE.—*State Regulation.*—*Act Limiting Rental Price of Instruments.*—*Constitutional Law.*—The State has the right to prescribe the maximum price which a telephone company shall charge for the use of its telephones, and the act of April 13th, 1885, limiting the rental price of such instruments, and also the amount which shall be collected for conversations between cities and villages, is constitutional.

SAME.—*Patent.*—*Power of State to Regulate Property Created Under.*—The fact that the telephone and appliances are articles patented under the Con-

105	250
122	501
105	250
148	109
105	250
151	142
105	250
165	501

Hockett, v. The State.

stitution and laws of the United States, while vesting in the patentee, his heirs and assigns, the exclusive right, for a limited time, to make, use and vend the tangible property brought into existence by the application of the discovery covered by the letters patent, does not preclude State regulation of the property thus brought into existence.

SAME.—Property Devoted to Public Use.—In legal contemplation all the instruments and appliances used by a telephone company in the prosecution of its business are devoted to a public use, and property thus devoted to such use becomes a legitimate subject of legislative regulation.

SAME.—Guaranteed Rights in Property.—State regulation of property devoted to a public use is not the *taking* of property for a public purpose within the meaning of section 21, of article 1, of the Constitution of this State, nor is it an interference with the guaranteed rights of the citizen in private property.

SAME.—Word "Telephone" Includes all Instruments for Reception and Transmission of Messages.—The word "telephone," as used in the act of April 13th, 1885, was intended to designate, and did in fact refer to an apparatus composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument only.

SAME.—Term of Art.—Evidence.—The word "telephone" having become a term of art, evidence is admissible to explain its proper meaning.

SAME.—Legislative Intention.—There being nothing in the act of April 13th, 1885, or in other laws, which requires a telephone company to construct a new line against its will, or to maintain an old line longer than it may feel justified in doing, evidence that it could not construct, or continue to use, a particular line at the price limited without loss, can not be considered in determining the legislative intention in passing such act.

SAME.—Justice or Expediency of Act.—Remedy.—Where a statute is one which the Legislature had power to enact, the courts can not sit in judgment upon either its justice or expediency, but relief must be sought of the Legislature.

From the Marion Criminal Court.

J. E. McDonald, J. M. Butler, A. L. Mason, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, N. Williams, J. L. Thompson, and C. S. Holt, for appellant.

F. T. Hord, Attorney General, A. C. Harris, W. H. Calkins, C. Byfield and L. Howland, for the State.

NIBLACK, C. J.—On the 13th day of April, 1885, the Legislature of this State passed an act entitled "An act to regu-

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late the rental allowed for the use of telephones, and fixing a penalty for its violation," the tenor of which is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State shall be allowed to charge, collect or receive as rental for the use of such telephones, a sum exceeding three dollars per month where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

"SEC. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company or corporation, the price for the use of any telephone for the purpose of conversation between such cities or villages, shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

"SEC. 3. Any owner, operator, agent or other person, who shall charge, collect or receive for the use of any telephone any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offence, and on conviction shall be fined in any sum not exceeding twenty-five dollars."

On the 27th day of July 1885, Theodore P. Haughey requested the Central Union Telephone Company, a corporation organized under the laws of the State of Illinois, but owning and operating a telephone exchange, and system of telephone lines, at the city of Indianapolis, in this State, to rent him one telephone, to be used at his residence upon his farm, four and one-half miles from the company's telephone exchange, and two miles outside of the corporate limits of the city of Indianapolis, and to connect such telephone with the exchange by the erection of the necessary poles and wires. In response to this request, the company offered to rent to

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Haughey a hand telephone and magneto bell, and to connect them with its exchange, and to furnish exchange service from 7 o'clock A. M. until 6 o'clock P. M., each day, for \$3 per month, the company to have the right to place other subscribers upon the same line. But Haughey declined to accept that offer, and instead entered into a contract with the company for the use of "one battery transmitter and one magneto telephone," and "the necessary appliances for connecting them with the exchange," upon certain terms and conditions named in the contract, for which he agreed to pay the company the sum of \$33.50 for each quarter, or \$11.16 $\frac{2}{3}$ per month. The contract says:

"The above total sum is based upon the charges itemized as follows:

- "Rental of one magneto telephone and one battery transmitter (two telephones), at the rate of \$20 per annum
- "Labor and service charges for switching, construction and maintenance charges for lines, batteries, central office apparatus, magneto bell and other appurtenances, at the rate of \$114 " "

The telephone company built the line and furnished the equipments for the use of Haughey, called for by its contract with him.

At the expiration of the first three months after the contract went into effect, the appellant, John E. Hockett, acting as the district superintendent and general agent of the company at Indianapolis, demanded of, and received from Haughey the sum of \$33.50, claimed to be due under the contract for the latter's use of the line and equipments therein provided for, during the preceding three months.

An information was thereupon filed against Hockett, charging him with a violation of the provisions of the act of the Legislature, herein above set out, and, upon proof of the matters above stated, with others of a formal, incidental, or a

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merely collateral character, the court below found him guilty of having charged more for the use of a telephone than the law permitted him, as well as the company he represented, to do, and, after overruling a motion for a new trial, adjudged that he pay a fine as a penalty for the commission of a criminal offence.

It was shown at the trial that the articles furnished to Haughey as a telephone equipment, as well as all the other mechanical contrivances used by the company in the transmission of words and sounds over its wires, are patented articles, and that the company holds the right to use these patented articles by assignment either direct or remote from the patentee.

It is first and most earnestly contended that, as the articles used by the company as above are patented, under the Constitution and laws of the United States, the Legislature of a State has no power to limit the price, use, sale or rental value of such articles, and that, as a consequence, all acts of a State Legislature of the class to which the one before us belongs, are inoperative and ineffectual for any practical purpose. Conceding the force, as well as the plausibility, of many of the arguments and illustrations used by counsel, the ready, and, indeed, inevitable answer is, that the question thus presented ought no longer to be regarded as an open question. There is a reserved, and, at the same time, well recognized power, affecting their domestic concerns, remaining in all the States, which the government of the United States can not, and has seldom attempted to invade. This power is so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized, in particular cases, are quite numerous, as well as various in their application to our complex system of government. This reserved power is usually, though perhaps not always accurately, denominated the police power of a State, and embraces the en-

tire system of internal State regulation, having in view not only the preservation of public order and the prevention of offences against the State, but also the promotion of such intercourse between the inhabitants of the State as is calculated to prevent a conflict of rights, and to promote the interests of all. *Cooley Const. Lim.* 572.

It is a power inherent in every sovereignty, and is, in its broadest sense, nothing more than the power of a State to govern men and things within the limits of its own dominion. *License Cases*, 5 How. 504, 582.

It extends to the protection of the lives, limbs, health, comfort and convenience, as well as the property, of all persons within the State. It authorizes the Legislature to prescribe the mode and manner in which every one may so use his own as not to injure others, and to do whatever is necessary to promote the public welfare, not inconsistent with its own organic law. *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140.

In 1867 letters patent were issued to one DeWitt for a discovery in the manufacture of a quality of oil known as "Aurora Oil," and one Patterson became the assignee of the right conferred upon DeWitt by his letters patent. Under a system of inspection provided by the laws of Kentucky, some casks containing this Aurora oil were branded "unsafe for illuminating purposes," and notwithstanding a statute of that State making it a penal offence to sell oil thus branded, Patterson sold the casks of oil in question to one Davis. Patterson was thereupon indicted, tried and convicted in one of the Kentucky courts for the alleged unlawful sale of these condemned casks of oil. This judgment convicting Patterson of a criminal offence having been affirmed by the Court of Appeals of that State, the cause was taken to the Supreme Court of the United States to test the validity of the statute under which Patterson was so convicted, as a restraint upon the sale of a commodity covered by letters patent from the United States. Upon a review of all the questions involved, the validity of the statute was maintained, and the judgment

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of the Court of Appeals was in all things affirmed. See *Patterson v. Kentucky*, 97 U. S. 501.

The court held in that case, and as we have no doubt correctly, that all that the letters patent secured was the exclusive right in the discovery, and that the right thus secured was an incorporeal right, and hence without "tangible substance;" that the right to sell the oil was not derived from the letters patent, but existed and could have been exercised before the issuing of such letters, unless prohibited by some local statute; that because the patentee acquired a monopoly in his discovery, and was hence secure against interference, it did not follow that the tangible property which came into existence by the application of the discovery was beyond the control of State legislation; that, on the contrary, the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright itself; that hence the right conferred upon the patentee and his assigns to make, use and vend the corporeal article or commodity brought into existence by the application of the patented discovery must be exercised in subordination to the police or local regulations established by the State. The doctrine of that case was approved and followed in the more recent case of *Webber v. Virginia*, 103 U. S. 344, and has the support, either in direct terms or in principle, of numerous other carefully considered cases. *Patterson v. Commonwealth*, 11 Bush, 311 (21 Am. R. 220); *State v. Telephone Co.*, 36 Ohio St. 296 (38 Am. R. 583, and note); *Jordan v. Dayton*, 4 Ohio, 295; *Fry v. State*, 63 Ind. 552; *People v. Russell*, 49 Mich. 617 (43 Am. R. 478); *Thompson v. Staats*, 15 Wend. 395; *Martinetti v. Maguire*, Deady, 216; *Vannini v. Paine*, 1 Harrington, 65; *License Tax Cases*, 5 Wall. 462; *United States v. De Witt*, 9 Wall. 41; *Railroad Co. v. Husen*, 95 U. S. 465; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Brechbill v. Randall*, 102 Ind. 528 (52 Am. R. 695); *Palmer*

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v. State, 39 Ohio St. 236 (48 Am. R. 429); *Western U. Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

While, therefore, it is true that letters patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use and vend the tangible property brought into existence by a practical application of the discovery covered by the letters patent, for a limited time, it is not true that such exclusive right authorizes the making, using or vending of such tangible property in a manner which would be unlawful except for such letters patent, and independently of State legislation and State control.

It is next contended that the Central Union Telephone Company was organized, and has so far been conducted as an ordinary business investment, and is in its methods, as well as in its relations to its patrons and subscribers, a merely private enterprise, no more subject to legislative control than any other private business with which a considerable number of persons have become either directly or indirectly connected; that consequently the act of the Legislature, under which this prosecution was instituted, is inoperative and void as a restraint upon the company in its charges for the rental and use of its instruments.

The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may, therefore, be regarded, when relatively considered, as an indispensable

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instrument of commerce. The relations which it has assumed towards the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to a public use. *State, ex rel., v. Nebraska Telephone Co.*, 22 N. W. Rep. 237; 22 Cent. Law Jour. 33; *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; *State v. Telephone Co.*, *supra*; *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 44 Am. R. 237, n.

It is now a well settled legal proposition that property thus devoted to a public use becomes a legitimate subject of legislative regulation and control. In recognition of that doctrine the case of *Munn v. Illinois*, 94 U. S. 113, has become a leading case.

It was, in general terms, held in that case, that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use to which he has so devoted his property, and that he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion, the court said it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and, in so doing, to fix a maximum of charges to be made for services rendered, accommodations extended and articles sold. This case has been the subject of much unfriendly comment and has encountered some very sharp criticism, but its authority as a precedent remains unshaken.

This State regulation and control of property devoted to a public use is not the *taking* of property for a public pur-

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pose within the meaning of section 21 of article 1 of the Constitution of this State. Nor is such regulation and control an interference with the guaranteed rights of the citizen in private property. As bearing generally upon the subjects lastly above referred to, see, also, the cases of *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155; *Chicago, etc., R. R. Co. v. Ackley*, 94 U. S. 179; *Winona, etc., R. R. Co. v. Blake*, 94 U. S. 180; *Railroad Co. v. Richmond*, 96 U. S. 521; *Railroad Co. v. Fuller*, 17 Wall. 560; *Olcott v. Supervisors*, 16 Wall. 678; *Ruggles v. Illinois*, 108 U. S. 526; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Ruggles v. People*, 91 Ill. 256; *Illinois Central R. R. Co. v. People*, 108 U. S. 541; S. C., 1 A. & E. R. R. Cas. 188; *Allnutt v. Inglis*, 12 East, 527; *Mayor, etc., of Mobile v. Yuille*, 3 Ala. 137; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 343; *Bolt v. Stennett*, 8 T. R. 606; *Com. v. Duane*, 98 Mass. 1; *Com. v. Tewksbury*, 11 Met. 55; *Com. v. Alger*, 7 Cush. 53; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Slaughter-House Cases*, 16 Wall. 36; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147; *Grant v. Courter*, 24 Barb. 232; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Mass.*, *supra*; *Ogden v. Saunders*, 12 Wheat. 212; *Standard Oil Co. v. Combs*, 96 Ind. 179 (49 Am. R. 156); *Western U. Tel. Co. v. Pendleton*, *supra*; *Indianapolis, etc., R. R. Co. v. Kercheval*, 16 Ind. 84; *Foster v. Kansas*, 112 U. S. 201; *Brechbill v. Randall*, 102 Ind. 528; *Fry v. State*, *supra*; *Toledo Agr'l Works v. Work*, 70 Ind. 253; *West Virginia, etc., Co. v. Volcanic Oil Co.*, 5 W. Va. 382; *State v. Perry*, 5 Jones L. 252; *Attorney General v. Railroad Companies*, 35 Wis. 425.

The obvious deduction from what has been said, as well as from the authorities cited, is, that the power of a State Legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete.

It was made to appear by the evidence that there are sev-

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eral instruments more or less in use by telephone companies, each known as a "telephone," one as the hand telephone, another as the box telephone, a third as the switchman's head telephone, and the fourth as the battery transmitting telephone; that the first, known also as the Bell hand or magneto telephone, consists of a bar magnet with a helix of wire at one end, a diaphragm suitably mounted in front of the helix, and a hard rubber case supporting the whole, with combined poles for making connection with a cord from twenty-four to thirty inches long, and through it with a magneto bell; that this telephone will both transmit and receive sounds or words carried electrically over a connecting wire; that this instrument was at first, with the assistance only of the magneto or call bell, used in transmitting as well as in receiving telephonic messages; that some time after this Bell hand telephone had thus come into use, the battery transmitting telephone, known as the Blake transmitter, was introduced and generally accepted as a very decided improvement in the transmission of words and sounds over wires used by telephone companies, words and sounds being transmitted through it in a louder tone and with greater effect than through the Bell hand telephone; that for some time previous to the 13th day of April, 1885, this Blake transmitter had come into general use in the transmission of messages with that class of patrons and subscribers who desired the best available telephonic service; that since the Blake transmitter had come into general use as stated, the Bell hand telephone had been chiefly used as a receiver of messages, only a comparatively few persons continuing to use it also for transmitting purposes; that, on the day last named, and for a considerable time previously, a fully equipped organization for the convenient and ready transmission and reception of messages over telephonic wires, consisted, as it still consists, of a Bell hand telephone and cord, a Blake transmitter, a magneto or call bell, a cell of battery, a backboard and a battery box; that the instru-

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ments thus constituting a telephonic equipment have been and still are only rented by telephone companies to their patrons and subscribers, the latter not being allowed to either purchase or own any of such instruments.

Upon the facts thus disclosed by the evidence, it is, in the third place, contended that the act of April 13th, 1885, under consideration, only limits the price to be charged to three dollars per month when one instrument, known as a telephone, is rented to a patron or subscriber, and does not apply to a case like the one before us, where two instruments, each answering to that name, are, for his greater convenience, rented to the same person to be used together, and that consequently the facts of this case do not bring it within the penal provisions of that act.

In a general sense, the name "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tube used in conveying the sound of the voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or discs, by which the voice is carried to a distant point, is, strictly speaking, a telephone. But since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires. In a secondary sense, however, being the sense in which it is most commonly understood, the word "telephone" constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety, ordinarily used in the transmission, as well as in the reception, of telephonic messages. In this latter sense, the Central Union Telephone Company, in behalf of which the appellant stands as the representative in this proceeding, has very significantly sanctioned the use of the word "telephone."

In August, 1885, it published a book for the use of its patrons and subscribers, entitled "Indianapolis Telephone

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Directory," in which those having the use of its telephonic instruments were instructed as follows:

"Call by numbers.

"When through talking ring out.

"Make all complaints to the chief operator—call No. 1,000.

"Help each other by answering your telephone promptly.

"Do not allow non-subscribers to use your telephone. It is unjust to other subscribers, impedes the service, and is a violation of your contract."

These were a substantial repetition of instructions issued by the Western Telephone Company, one of the predecessors of the Central Union Telephone Company, in June, 1883. In these instructions the "telephone" is plainly referred to as an organized apparatus—an institution—and not as a single instrument. In this use of the word "telephone," the telephone companies in question simply adopted and emphasized what had already been generally accepted as the proper meaning of that word in the connection in which it was so used by them.

Before the great discovery of Prof. Morse in telegraphy, the power of electricity to give a sudden and mysterious impulse to a suspended wire was well understood among those most familiar with experiments in electrical science. His discovery consisted in the invention of an instrument, or machine, which utilized that power of electricity, and thereby enabled him to send intelligible messages over suspended wires to remotely distant places. When that instrument, or machine, first came into use, the word "telegraph" was understood to more particularly refer to it as the thing best known by that name; but since that time a much wider and more comprehensive meaning has been attached to that word.

The "telegraph" is now usually accepted, and in common parlance is generally understood, as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: *First*. A battery or

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other source of electric power; *Secondly*. Of a line-wire or conductor for conveying the electric current from one station to another; *Thirdly*. Of the apparatus for transmitting, interrupting, and, if necessary, reversing the electric current at pleasure; and *Fourthly*. Of the indicator or signaling instrument. See Imperial Dictionary, title "Telegraph."

In the respect indicated, the varying meanings of the word "telephone" are analogous to those applied to the word "telegraph," there being very much in common between the two systems of telephony and telegraphy. In reaching a conclusion as to what is generally understood by the use of the word "telephone," we have been governed partly by the information judicially within our reach, and in other respects by the evidence. The word having become a term of art, evidence was admissible to explain its proper meaning. 1 Greenl. Ev., section 280; Whart. Ev., section 961 to 972.

In view of the condition of things as shown to have existed on the 13th day of April, 1885, we feel constrained to hold that the word "telephone," as used in the act of that date, was intended to designate, and in fact really referred to an apparatus composed of all the usual and necessary instruments for the convenient and ready transmission and reception of telephonic messages, and not to a single instrument only.

There was evidence at the trial tending to prove that the Central Union Telephone Company can not supply the facilities to Haughey provided for in its contract with him for three dollars per month, without actual and very serious loss, and, arguing that the Legislature can not be presumed to have intended to inflict injustice upon any person or corporation, it is insisted we ought to take the company's liability to sustain a great loss in a certain contingency into consideration in determining the legislative intention in enacting the statute in question in this case. This argument is largely based upon the assumption that the company was not at liberty to decline to extend its line to Haughey's farm upon his

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request that such an extension should be made, and that it will be compelled to maintain such extension so long as Haughey may require it to be maintained, independently of any contract with him on the subject. This assumption is, however, not well founded. There is nothing in the act of the Legislature under review, or contained in any other statutory or common law regulation applicable to the subject, to which our attention has been called, which requires a telephone company to construct a new line against its will or to maintain an old line longer than it may feel inclined to do so in the exercise of a legitimate business discretion. Besides, the power of the Legislature to pass the act in question being conceded, this court can not sit in judgment upon either the justice or the expediency of the enactment of such a law. If the law shall prove to be either unjust or inexpedient in its operation, whether upon persons or corporations, the appeal must be to the Legislature and not to the courts. 20 Cent. Law Jour. 83.

The judgment is affirmed, with costs.

Filed Feb. 20, 1886.

No. 12,223.

SEVERIN v. THE BOARD OF COMMISSIONERS OF DEARBORN
COUNTY.

COUNTY AUDITOR.—*Performing Work of Predecessor.—Compensation.—Liability of County.—Notice to Board of Commissioners.*—If a county auditor is entitled to recover at all against the county for performing work which his predecessor should have done, he must clearly show that the work should have been performed by his predecessor, and that before proceeding with it he notified the board of commissioners to that effect, and that he would look to the county for compensation.

From the Dearborn Circuit Court.

W. H. Bainbridge and R. E. Slater, for appellant.

H. D. McMullen, for appellee.

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ELLIOTT, J.—The appellant seeks to recover for services performed by him as auditor of Dearborn county, upon the theory that an incoming auditor is entitled to compensation for doing official work left undone by his predecessor in office. We doubt whether this theory is a sound one, for we are inclined to the opinion that where a public officer claims compensation for official services, he must show either a statute giving it to him, or a contract stipulating for it made by some officer or body having authority to bind the county. *Board, etc., v. Harman*, 101 Ind. 551; *Noble v. Board, etc.*, 101 Ind. 127; *Bynum v. Board, etc.*, 100 Ind. 90; *Wright v. Board, etc.*, 98 Ind. 88; *Donaldson v. Board, etc.*, 92 Ind. 80; *Nowles v. Board, etc.*, 86 Ind. 179.

We need not, however, decide whether the general theory of the appellant is or is not sound, for we are satisfied that in the case before us it does not appear that the work done by the appellant was work that his predecessor should have done. Where a county officer seeks to hold a county in a case where he has made no contract, and where there is no express statute creating a liability, he must make a clear case to justify a recovery, conceding that there can be any recovery at all. The services sued for are alleged to have been performed by the claimant in completing the tax duplicate which had been partly prepared by his predecessor. These services are thus specified: "To computing taxes, footing up the same, and copying on auditor's duplicates and numbering names of taxpayers in regular progression on the duplicate." It appears from the complaint that the appellant came into office on the first day of November, and as the statute requires that the duplicate shall be completed before the last day of December, he had two months' work to do upon the duplicate. The court can not say whether the work specified was that which it was the duty of the appellant to perform, or was that which his predecessor ought to have done, without a much fuller statement of the facts than the one here presented. There is no statute requiring an

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outgoing auditor to fully complete the duplicate, and, for anything that here appears, the predecessor of the appellant may have fully performed his part of the work.

In another respect there is a defect in the appellant's complaint, even upon the concession that his general theory is correct. If there can be any recovery at all in a case of this class, it must be shown that before proceeding with the work the auditor notified the board of commissioners that the work ought to have been done by his predecessor, and that he would look to the county for compensation. The auditor had no right to proceed, granting the soundness of his own theory, without consultation with the commissioners. It was not for him to decide for himself that the work ought to have been done by his predecessor, and that the county must pay him for doing it. The county auditor's power is hardly so autocratic as to permit him to make and enforce such a decision.

Judgment affirmed.

Filed Jan. 30, 1886.

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No. 11,681.

EVERSON v. SELLER.

INSTRUCTIONS TO JURY.—*Harmless Error.*—*Supreme Court.*—*Practice.*—It is a harmless error, for which a judgment will not be reversed, to refuse to give a correct instruction asked by a party, where the law is properly stated in an instruction given by the court of its own motion.

CONVERSION.—*Measure of Damages.*—Where one unlawfully enters upon the premises of another and cuts and hauls to his mill logs belonging to the latter, the measure of damages, in an action by the owner to recover the value of the logs, is the value of the lumber in the logs at the mill and at the time they are there converted by the defendant to his own use, without any reduction for labor bestowed upon them.

From the Montgomery Circuit Court.

Everson v. Seller.

E. C. Snyder and *M. W. Bruner*, for appellant.

J. Wright and *J. M. Seller*, for appellee.

Howk, J.—In his complaint in this cause the appellee Seller alleged that, in January, 1883, he was the owner and in the possession of twenty-five oak logs, of the value each of \$25; that the appellant Everson, and his agents, unlawfully entered upon appellee's premises and seized, hauled away and appropriated such oak logs to his own use; and that appellee expressly waived the tort described and brought this suit to recover the value of the logs so taken and appropriated by appellant to his own use. Wherefore, etc.

The cause was put at issue and tried by a jury, and a general verdict was returned for the appellee, assessing his damages in the sum of four hundred and seventy dollars. With their general verdict the jury also returned into court their special findings on particular questions of fact, submitted to them by the parties under the direction of the court. The facts thus found by the jury were, substantially, as follows:

There was no contract made between the parties to this suit on the 6th day of November, 1882, or at any other time, whereby plaintiff sold to defendant, or agreed to sell to him, the timber in question in this case. On November 6th, 1882, plaintiff sold to defendant just fifty-six oak trees, no more and no less. Plaintiff did not, on November 6th, 1882, or at any time, sell or agree to sell to defendant more than six trees in the north pasture. On or about December 19th, 1882, and on the first day defendant's hands began to cut timber on plaintiff's farm, plaintiff informed such hands that defendant had bought but six trees in the north pasture. Plaintiff told defendant's hands, on the day they began to cut timber on plaintiff's farm, that, when they had cut six trees in the north pasture, they must quit and cut no more in that pasture. There were thirty-seven thousand six hundred feet of lumber in the twenty-four logs in question in this cause. Defendant's hands, when they had cut not to exceed seven trees

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in the north pasture, quit cutting in that pasture and began to cut in the south and middle pastures on plaintiff's farm. Plaintiff did not sell to defendant ninety oak trees for the sum of \$700, and the trees sued for herein were not included in such sale, and defendant did not pay the agreed price for such trees.

Over appellant's motion for a new trial the court rendered judgment against him, in appellee's favor, for the damages assessed in the general verdict.

Several errors are assigned here by the appellant, but the only questions discussed by his counsel in their briefs of this cause are such as arise under the alleged error of the court in overruling the motion for a new trial.

It will be seen from the facts specially found by the jury, that the controverted question between the parties in the trial court was whether the oak logs, described in appellee's complaint, were, or were not, part and parcel of a lot of standing trees purchased of appellee and paid for by the appellant.

Upon conflicting evidence the jury decided this question in favor of appellee and against the appellant, and, of course, under our practice, we could not disturb this decision, even though it might seem to be contrary to, and in conflict with, the fair preponderance of the evidence. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

Appellant's counsel do not ask in argument for the reversal of the judgment upon the weight of the evidence. They insist, however, that the circuit court erred in overruling appellant's motion for a new trial for two reasons, namely: 1. Because the court erred in refusing to give the jury a certain instruction, at appellant's request; and, 2. Because of error in the assessment of the amount of recovery, the same being too large.

The instruction asked by appellant and refused by the court was as follows: "If the jury find from the evidence that defendant purchased from the plaintiff the timber herein sued for, and paid for the same the agreed price, then you must

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find for the defendant." It is claimed by appellant's counsel that, "in refusing to give this instruction, the court erred, unless the same was embodied in some other instruction given to the jury." We think that the law of the instruction quoted was embodied in an instruction given the jury by the court of its own motion and in its own language. The instruction quoted was pertinent to the second paragraph of appellant's answer, which was substantially a special plea of payment. In one of its own instructions the court told the jury, in substance, that if they found the defendant had proved the material allegations of the second paragraph of his answer by a fair preponderance of the evidence, they must find for the defendant. It is manifest, therefore, that the error of the trial court in refusing the instruction quoted did not harm the appellant, and, for a harmless error, a judgment will not be reversed. *Freeze v. DePuy*, 57 Ind. 188; *Stott v. Smith*, 70 Ind. 298; *Town of Princeton v. Gieske*, 93 Ind. 102.

The second reason assigned by appellant's counsel, *supra*, for claiming that the court erred in overruling the motion for a new trial, presents for decision a more difficult question. At the point on appellee's farm where the logs in controversy were cut by the appellant, there was evidence before the jury tending to prove that the lumber in the logs was worth seventy-five cents per 100 feet. The jury found specially, as we have seen, that there were 37,600 feet of lumber in the logs converted by appellant, and this number of feet, at seventy-five cents per 100 feet, would give as the value of the lumber, at the place where the logs were cut, the sum of \$282. The logs were cut by appellant in January, 1883, and the trial of this cause below occurred one year later, in January, 1884. Adding, therefore, one year's legal interest to the value of the lumber in the logs as above, at the place where they were cut by appellant, makes a sum total of \$298.92; and this sum, appellant's counsel insist, was the highest amount of damages the appellee was lawfully entitled to recover under the evidence. In their general verdict the jury

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assessed the appellee's damages in the sum of \$470, and, therefore, it is claimed, on behalf of appellant, that there was error in the assessment of the amount of appellee's recovery, or that his damages were excessive in the sum of \$171.08. This claim is based upon the theory that appellant's conversion of appellee's logs or lumber occurred at the time and place when and where appellant severed such logs or lumber from the freehold, and that, in such case, the measure of appellee's damages (the tort being expressly waived) is the value of such logs or lumber at that time and place, with interest added until the time of the trial.

Before the appellee instituted this suit appellant removed the logs in controversy from appellee's farm, and hauled them about five miles to his saw-mill, in the town or village of New Ross, a station on a line of railroad. There was evidence before the jury from which they might have found, and apparently did find, that at the time of the commencement of this suit, and at appellant's saw-mill in New Ross, where the oak logs described in the complaint then were, such logs or lumber were then and there worth the sum of one dollar and fifty cents per one hundred feet. If the jury found, as they might have done on the evidence, that such logs or lumber were then and there worth that sum per 100 feet, and if that value was then and there (the tort being waived) the true measure of appellee's damages for the conversion of his logs or lumber, it is manifest that appellant can not successfully claim there was error against him in the assessment by the jury of the amount of appellee's recovery, or that the damages assessed in the general verdict were excessive. The trial court instructed the jury, as to the measure of damages in this case, as follows: "The measure of damages is the value of the logs at the time they were converted to the defendant's use, without any deduction for labor rendered or bestowed upon them by the wrong-doer."

This instruction is in accord with previous decisions of this court, and contains, we think, a correct statement of the true

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rule for the measure of appellee's damages in the case in hand. *Yater v. Mullen*, 24 Ind. 277; *Ellis v. Wire*, 33 Ind. 127 (5 Am. R. 189). It is clear, we think, that the appellee might have recovered the possession of the logs after they were removed by appellant to his mill at New Ross, and this being so, we know of no reason, and none is suggested by appellant's counsel, why the measure of appellee's damages in this suit should not be the value of the lumber in the logs at New Ross and at the time the logs were there converted by appellant to his own use.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Feb. 9, 1886.

No. 12,742.

GRAETER v. THE STATE.

CRIMINAL LAW.—Indictment.—Motion in Arrest.—On a motion in arrest of judgment, if the indictment is found to contain all the essential elements of a public offence, even though to some extent defectively stated, it will be held sufficient.

SAME.—Permitting Leased House to be Kept as a House of Ill Fame.—An indictment which charges that the defendant, at, etc., on, etc., did unlawfully permit a certain frame building, situate on lot No. 41, in the city of V., which he had theretofore let to one A., to be kept as a house of ill fame, and resorted to for the purpose of prostitution, then and there well knowing that it was so kept, etc., is sufficient on a motion in arrest of judgment.

SAME.—Instruction.—Evidence.—Reputation of Defendant for Chastity.—In the trial of a cause wherein the defendant is charged with having permitted a building theretofore let by him to be kept as a house of ill fame and resorted to with his knowledge for the purpose of prostitution, evidence of the reputation of defendant for virtue and chastity is not admissible; but where such evidence has neither been offered nor admitted, and where his reputation has been in no way suggested during the trial, an instruction to the jury, that it was competent for the State to prove the

105	271
124	304
127	410
105	271
136	234
136	236
105	271
138	19
139	540
105	271
140	444
141	110
105	271
159	218
105	271
167	182

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reputation of the defendant for chastity and virtue, is not such an error as would justify a reversal.

SAME.—Actual Knowledge of Defendant.—In such a case an instruction that a landlord could not be convicted of the offence charged without proof that he had knowledge that the house let was kept as a bawdy-house, but that it was not necessary to prove that he had witnessed acts of prostitution in the house, or that he had been personally notified of such acts; that knowledge might be proved by circumstantial evidence, by proof of such facts and circumstances as would justify the jury in coming to the conclusion that he had such knowledge, is not erroneous, the jury having been instructed as to the doctrine of reasonable doubts.

SAME.—Instruction.—Purpose of Statute.—In such a case an instruction that "the statute upon which this prosecution is based was enacted for the first time in this State in 1881; prior statutes had proven insufficient to restrain what all good citizens regarded as a growing evil; this statute aims to lessen the evil by interposing a formidable obstacle to the securing of houses and shelter by prostitutes," contains nothing that could have prejudiced the defendant.

SAME.—Prima Facie Case.—Want of Knowledge.—Where, in such a case, it is proved by the State that the ill fame of the house existed, and that it was flagrant and notorious, and the other elements of the case are made out, a *prima facie* case is made out, and it is then incumbent on the defendant to show that he had no knowledge, or that the circumstances were such that he may have remained ignorant of the facts, want of knowledge being a fact so peculiarly within his own breast that it must be regarded as an essential element of his defence.

From the Knox Circuit Court.

O. H. Cobb and *J. S. Pritchett*, for appellant.

W. A. Cullop, Prosecuting Attorney, *G. W. Shaw* and *C. B. Kessinger*, for the State.

MITCHELL, J.—The grand jury of Knox county presented to the court, by formal indictment, that Frederick Graeter did, on a day therein named, unlawfully permit a certain frame building situate on lot numbered forty-one, in the city of Vincennes, which he had theretofore let to one Mollie Avery to be kept as a house of ill fame and resorted to for the purpose of prostitution, then and there well knowing that it was so kept, etc.

After conviction there was a motion to arrest the judgment, on the ground that the facts stated in the indictment did not

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constitute a public offence. It is contended that the court erred in overruling this motion. The reasons assigned are that the indictment does not disclose the terms of the letting, the time when the tenancy commenced, nor that the person to whom the building had been theretofore let was at the date of the alleged offence, or within two years prior thereto, the tenant of the defendant. Section 1994, R. S. 1881, provides that, "Whoever keeps a house of ill fame, resorted to for the purpose of prostitution or lewdness; or knowingly lets a house to be so kept; or knowingly permits a house which he has let to be so kept,—shall be fined," etc.

The indictment is predicated on the last clause of the foregoing statute. The offence is described substantially in the terms employed in defining it. As a general rule this is sufficient. *State v. Miller*, 98 Ind. 70; *Betts v. State*, 93 Ind. 375. Whether the house was, at the date of the alleged offence, let to and occupied by Mollie Avery, is not stated in the indictment with as much certainty as a strict regard for technical precision might require, on a motion to quash. It is charged, however, that the house had been theretofore let to her, and that subsequent to the letting the defendant had knowingly permitted it to be kept as a house of ill fame. On a motion in arrest, if the indictment is found to contain all the essential elements of a public offence, even though to some extent defectively stated, it will be held sufficient. *Greenley v. State*, 60 Ind. 141; *Lowe v. State*, 46 Ind. 305; *Shepherd v. State*, 64 Ind. 43.

The sixth, seventh and eighth instructions given by the court are complained of. In the sixth, the jury were told that it was not necessary for the State to prove particular acts of prostitution, as having occurred in the house, in order to establish the allegation that it was a house of ill fame. That while such proof was competent, it was also competent, for the purpose of sustaining such allegation, to prove the general reputation of the house, and also of its inmates and

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frequenters, male and female, "and of the defendant, for chastity and virtue." The last part of the instruction is especially assailed. If any evidence had been either offered or admitted, upon the subject of the defendant's chastity or virtue, in proof of the allegation referred to, we should have no doubt but that the giving of that part of the instruction quoted, as well as the admission of such evidence, would have been such error as must have resulted in a reversal. It was not proper to admit or to consider evidence of the defendant's reputation for chastity and virtue, in order to establish the allegation that the house was a house of ill fame. No such evidence was offered or admitted, and so far as the record shows the subject of the defendant's reputation was in no manner suggested during the course of the trial except as above stated. We can not, therefore, considering the result arrived at upon the evidence, regard the error as one which could have misled the jury or prejudiced the substantial rights of the defendant. Section 1891, R. S. 1881; *Epps v. State*, 102 Ind. 539. That it was competent to consider evidence of general reputation, to establish the fact that the house was kept as a house of ill fame, see *Betts v. State*, *supra*.

The jury were told in the seventh instruction, that a landlord could not be convicted of the offence charged, without proof that he had knowledge that the house let was kept as a bawdy-house, but that it was not necessary to prove that he had witnessed acts of prostitution in the house, or that he had been personally notified of such acts; that knowledge might be proved by circumstantial evidence, by proof of such facts and circumstances as would justify the jury in coming to the conclusion that he had such knowledge.

The appellant insists that the proof must have shown that he had actual knowledge that the house was being kept as a house of ill fame, and that, with such knowledge, he willingly permitted the house to be so kept. If by actual knowledge it is meant that he must have had personal knowl-

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edge, from having witnessed acts of prostitution, we do not agree with counsel's contention. The appellant may have had such actual knowledge from facts and circumstances, as required him to expel the occupants of the house. The owner of a house so kept may not shut his eyes to that which is patent to the community around him, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge. To hold that personal knowledge, from having witnessed acts of prostitution, or notice from persons who had witnessed such acts, was required, would be to render the statute practically a dead letter. The jury had been told in the third instruction, that before the defendant could be convicted they must be satisfied beyond a reasonable doubt that he had knowingly permitted the house to be kept by Mollie Avery as a house of ill fame, resorted to for the purpose of prostitution. Considered in connection with the third, the seventh instruction was not erroneous.

The court told the jury that "the statute upon which this prosecution is based was enacted for the first time in this State in 1881. Prior statutes had proven insufficient to restrain what all good citizens regarded as an alarming evil. This statute aims to lessen the evil by interposing a formidable obstacle to the securing of houses and shelter by prostitutes." We are unable to discover anything in this which could have prejudiced the appellant.

The contention of the appellee, that the instructions are not in the record, is not well made. They are properly presented by a bill of exceptions filed under section 1849, R. S. 1881. This latter section appears, through an error, to be cited in *Erlinger v. East*, 100 Ind. 434. The section there intended was 629, R. S. 1881.

It is contended with much earnestness that the evidence does not sustain the verdict of the jury. The argument at this point is directed to two propositions: *First*. That there is no evidence that the defendant knew that the house

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was being kept as a house of ill fame. *Second.* That the proof does not show that the house was rented to Mollie Avery, and that it was being so kept by her as the tenant of the appellant, and that, therefore, there is a fatal variance. Five witnesses testified on behalf of the State, to the effect that the house had been kept as a house of prostitution by Mollie Avery for a period of from two to three years before the indictment was returned; that at some periods three and four prostitutes at a time were inmates of the house; that it was generally reputed to be a house of prostitution; that the defendant, during all that time lived about one square and a half distant, and in sight of the entrance to the house; that men and lewd women were frequently seen to go in the house, both in the day and night time. One witness testified that, on several occasions, inmates of the house had been arrested; that from two to five men at a time were seen in the house. The defendant did not offer a syllable of testimony of any kind, and in this state of the evidence the jury, under instructions from the court, found him guilty of knowingly permitting the house to be kept as a house of ill fame. That the ill fame of the house existed, and that it was flagrant and notorious, is not and can not be disputed. In such a case, want of knowledge is a fact so peculiarly within the breast of the accused that it must be regarded as an essential element of his defence. *Brow v. State*, 103 Ind. 133; *Goetz v. State*, 41 Ind. 162; *Farrell v. State*, 45 Ind. 371; *Ward v. State*, 48 Ind. 289; *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 144).

When the State proved the fact to exist, and that it was a matter of general repute in the community in which the defendant lived, a *prima facie* case was made. It was then incumbent on the defendant to show that he had no knowledge, or that the circumstances were such that he may have remained ignorant, of the facts.

With regard to the variance suggested, it may be said, the testimony shows that Mollie Avery lived in the house and

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was generally recognized as the occupant and proprietress. While it is true, another, whose relations with her are not satisfactorily established, testified that he habitually paid the rent; he also testified that the defendant told him on one occasion that "he wanted Mollie Avery to give up the house, as he wanted to remove it." It thus appears that the defendant as well as others recognized her as being in possession. We can not disturb the verdict on account of the amount of the fine assessed.

Judgment affirmed, with costs.

Filed Jan. 29, 1886.

No. 12,808.

LEVERICH v. THE STATE.

CRIMINAL LAW.—Bill of Exceptions.—Instructions.—Practice.—All exceptions in criminal causes, not saved by the entry of the clerk as a part of the proceedings in court, must be embraced in a bill of exceptions. Sections 1845-1849, R. S. 1881. This rule applies to instructions.

SAME.—Intent to Murder.—Threats.—Evidence.—In a prosecution for assault and battery with intent to murder, after evidence that the prosecuting witness attacked the defendant has been introduced, proof of previous threats by the former, although never communicated to the latter, is admissible on the ground that such threats may illustrate the character of the attack.

SAME.—Newly Discovered Evidence.—New Trial.—In such case, evidence of threats made by the prosecuting witness against the defendant, discovered after the trial, is cause for a new trial.

From the Grant Circuit Court.

A. Steele, R. T. St. John, J. A. Kersey and L. D. Baldwin, for appellant.

F. T. Hord, Attorney General, S. W. Cantwell, Prosecuting Attorney, and W. B. Hord, for the State.

NIBLACK, C. J.—Upon an indictment for an assault and

106	277
180	229
106	277
137	551
106	277
140	547
141	109
143	301
105	277
145	623
147	48
106	277
149	83
149	404
150	392
152	331
151	332
105	277
153	438
153	549
106	277
165	568
105	277
169	392
105	277
171	452

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battery with intent to murder one Sidney Dillman, Stephen Leverich, the appellant, was found guilty of an assault and battery with intent to commit manslaughter, and sentenced to pay a nominal fine and to be imprisoned in the State's prison for the term of two years.

Questions are first made here upon some of the instructions given by the circuit court to the jury. But the instructions complained of are not embraced in a bill of exceptions; they are only copied into the transcript by the clerk as a part of the proceedings at the trial, with an entry on the margin of each in these words: "Given and excepted to by the defendant. Nov. 24th, 1885. Steele & St. John, for def't."

It is objected on behalf of the State, that these instructions are not in the record in such a form as to present any question upon them here. Section 535, R. S. 1881, provides a summary method for reserving an exception to the giving, or the refusal to give, an instruction, without embodying it in a bill of exceptions. But, in the first place, the memorandum of exception therein provided for must be signed by the judge, and not by the attorney of the party excepting, as formerly. In the next place, the section in question has relation only to proceedings in civil causes. By a reference to sections 1845, 1846, 1847, 1848 and 1849, of the last revision of the statutes, it will be observed that all exceptions in criminal causes, not saved by the entry of the clerk as a part of the proceedings in court, must be embraced in a bill of exceptions. There is, consequently, no question before us upon the instructions copied into the transcript as herein above stated.

There was evidence tending to show that the appellant and Dillman, the prosecuting witness, were brothers-in-law, and that, notwithstanding some occasional differences, they were generally on what seemed to be friendly terms; that Dillman was a blacksmith; that the appellant was the owner of a buggy and a pair of mules; that on Sunday morning, the 7th day of June, 1885, the appellant hitched his mules to his buggy, and, taking one Doyle into the buggy with him, started

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to attend a basket meeting somewhere in Grant county ; that he stopped on his way at Dillman's blacksmith shop and invited the latter to accompany him to the basket meeting ; that Dillman having accepted the invitation, and the appellant seeing in his hand a piece of Babbitt-metal, weighing, perhaps, a pound or more, told him to put the metal in his pocket, as one Davis had threatened to attack him, Dillman, whenever he should see him ; that Dillman thereupon put the metal in his pocket and got into the buggy with the appellant and Doyle ; that the appellant, being the driver of the team, started thence in the direction of the basket meeting, but afterwards, with the consent of those accompanying him, turned and drove to the town of Marion, where the entire party remained until rather late in the afternoon ; that upon their return from Marion a discussion arose between the appellant and Dillman as to whether the former should take the latter back to his home, or drop him at some other point in the neighborhood ; that Dillman, becoming suddenly and seemingly angry, jumped out of the buggy, and, taking the Babbitt-metal from his pocket, threw it at the appellant and hit him with such force as to cut through his hat and into the flesh on one side of his forehead ; that the appellant, after recovering from the first stunning effect of the blow, also jumped from his buggy, and, drawing a rather large-sized knife, stabbed Dillman in the breast, inflicting a painful and injurious, but not fatal, wound. The appellant's claim at the trial was that in thus wounding Dillman he acted only in self-defence.

After the return of the verdict the appellant moved for a new trial upon the ground, amongst other things, of newly discovered evidence. This newly discovered evidence consisted in part of alleged threats by Dillman against the appellant's life, made prior to the collision between them which resulted in this prosecution, in support of which motion affidavits were duly filed.

It is insisted on behalf of the State that the alleged newly

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discovered evidence could only be used upon another trial for the purpose of impeaching Dillman, and that, as a new trial will not ordinarily be granted for newly discovered evidence of a merely impeaching character, the circuit court did not err in refusing to grant a new trial to let in proof of the alleged threats made by Dillman. *Evans v. State*, 67 Ind. 68.

When, however, threats may be proven in a case like this they are admissible as independent facts tending to throw light upon the transaction, and hence neither necessarily nor ordinarily as mere impeaching evidence.

Wharton on Criminal Evidence, at section 757, thus comments upon the admissibility of threats made by deceased or the prosecuting witness: "Can evidence to the effect that the deceased, prior to a homicide, threatened the defendant's life, be received; and if so, is it a prerequisite to the proof of such threats that they should be shown to have been communicated to the defendant? Certainly, if such evidence is offered to prove that the defendant had a right to kill the deceased, there being no proof of a hostile demonstration by deceased, then it is irrelevant. * * * * On the other hand, if the question is as to which party in the encounter is the assailant, then it is admissible to prove by the prior declarations of either that the attack was one he intended to make. Threats to this effect by the defendant are always, as has been seen, admissible; and it is properly held that there is equal reason, supposing a collision between the deceased and the defendant to be first proved, for the admission of such threats by the deceased." As to the same subject, see, also, *Holler v. State*, 37 Ind. 57 (10 Am. R. 74); *Wood v. State*, 92 Ind. 269; *Boyle v. State*, 97 Ind. 322; *Campbell v. People*, 16 Ill. 17.

Evidence that the deceased, or the prosecuting witness, attacked the defendant being first introduced, proof of previous threats by him is admissible upon the ground that such threats may tend to illustrate the character of the attack thus made, although never communicated to the defendant.

The evidence of threats made by Dillman, claimed to have

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been discovered since the trial, was, consequently, competent and material, and more than mere impeaching evidence, and, for that reason, we feel constrained to hold that a new trial ought to have been granted upon the showing made by the appellant.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will give the necessary notice for the return of the prisoner to the custody of the sheriff of Grant county.

Filed Feb. 9, 1886.

No. 10,996.

CONRAD v. KINZIE.

105	281
140	307
105	281
147	10

INSTRUCTIONS TO JURY.—*Omitted Points.*—*Practice.*—An objection to an instruction to the jury, that it fails to state the difference between the various paragraphs of defendant's answer, is unavailable. An instruction covering the point should have been asked.

SAME.—*Promissory Note.*—*Signing and Delivery on Sunday.*—*Province of Jury.*—In an action on a promissory note, alleged by the defendant to have been signed and delivered on Sunday, an instruction "that, before the defendant can successfully make out that kind of a defence, he should have pleaded in writing, as well as proved by a fair preponderance of the evidence, that he not only executed the note on Sunday, but that it was delivered and accepted by the plaintiff on Sunday," is correct, and does not invade the province of the jury.

SAME.—*Rule of Construction.*—Instructions are to be taken and construed together, and if, when so construed, they contain a correct statement of the law, they will afford no sufficient ground for reversal, even though a single sentence, standing alone and detached from its context, might seem to be erroneous.

From the Cass Circuit Court.

D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellant.

M. Winfield and Q. A. Myers, for appellee.

Conrad v. Kinzie.

Howk, J.—This was a suit by the appellee, Sarah Kinzie, against the appellant, Conrad, and one John M. Smith. Appellee's complaint counted upon a promissory note for \$134.58, executed by appellant and his co-defendant Smith, dated January 25th, 1879, and payable one day after date to appellee, by her then name of Sarah Skinner. Defendant Smith was defaulted and disappeared from the case. Appellant separately answered in six paragraphs, of which the first was a general denial of the complaint, and each of the other paragraphs stated a special defence. Appellee replied by a general denial. The issues joined were tried by a jury and a general verdict was returned for appellee. With their general verdict, the jury also returned into court their special findings on particular questions of fact submitted to them by appellant, under the direction of the court, as follows:

"1. Was not the note in suit signed by the defendant Conrad on the Sabbath-day? Answer. Yes.

"2. Was not the note in suit delivered by the defendant Conrad on the Sabbath-day to John M. Smith? Ans. Yes.

"3. Was not the note in suit delivered by Richard Skinner to the plaintiff on Sunday? Ans. No.

"4. Is not the defendant Conrad surety on the note in suit for John M. Smith? Ans. Yes.

"5. After defendant Conrad signed the note in suit, to whom did he deliver it and on what day of the week? Ans. To John M. Smith, on the Sabbath-day."

Over appellant's motions for a new trial and in arrest, the court rendered judgment for appellee, and against the appellant, on the general verdict of the jury.

A number of errors are assigned here by the appellant, but his counsel have expressly limited their argument to the consideration of the alleged error of the court in overruling his motion for a new trial. The other errors assigned must, therefore, be considered as waived. The only cause for a new trial insisted upon here, by appellant's counsel, is an alleged error of law occurring at the trial, in giving the jury

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a certain instruction of the court's own motion. This instruction reads as follows:

"To this complaint the defendant has answered by several paragraphs: *First*. He denies the execution of the note. *Second*. He says he has paid it. *Third*. That it was without consideration. In the *fourth*, *fifth* and *sixth* paragraphs, he sets up against the note, as a perfect defence, that the note was executed on Sunday by himself, W. T. Conrad, as surety for John M. Smith, and it was delivered by him on that day to his co-defendant, and that is as far as he has any knowledge of the note, and that he had received no consideration for the note. I am inclined to hold, upon that subject, the law to be as follows: That, before the defendant can successfully make out that kind of a defence, he should have pleaded in writing, as well as proved by a fair preponderance of the evidence, that he not only executed the note on Sunday, but that it was delivered and accepted by the plaintiff on Sunday. I hold that the decisions of the Supreme Court, that you have heard quoted here, are not now the law in this State, but there is a later decision which governs, and, as far as this case is concerned, the law as the court gives you, you must use and be governed by. The defendant, before he can avail himself of or properly make out the defence to prevent a recovery on the note at the hands of the plaintiff, either upon the fourth, fifth or sixth paragraphs of answer, must have proven by a fair preponderance of the evidence that this particular note in suit was executed by him upon Sunday, the first day of the week as it is called in the statute, and that it was delivered by him upon that day, or some one representing him, to the plaintiff in this case. If the plaintiff then accepted the note, knowing these facts, then she stands in equal respect of the law as being guilty of a violation of the criminal statute of this State. It is against the law to do common labor on the Sabbath-day, or the first day of the week commonly called Sunday.

"It is now decided by our Supreme Court, that if a note

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is executed upon the Sabbath-day (I mean by execution, signed), and it was afterwards delivered upon a Sabbath-day, the plaintiff knowing the fact—delivered to the plaintiff on the Sabbath-day—then these facts being proven by a fair preponderance of the evidence, the plaintiff could not recover in the case.”

The record of this cause contains no other instruction to the jury except the one above quoted; but it is certified in the bill of exceptions, that “the court gave to the jury no instruction that could, in any degree, limit, modify or change such instruction.” In their discussion of the instruction quoted, appellant’s learned counsel say: “We think this instruction is clearly bad for the following reasons:

“1. It misstates appellant’s sixth answer.

“2. It invades the province of the jury, and gives them to infer that certain necessary proof has not been made.

“3. It requires proof of knowledge in the appellee of the signing and delivery of the note on Sunday.

“4. The court directs the attention of the jury pointedly to certain decisions of the Supreme Court, to the prejudice and injury of the appellant.”

We will consider and pass upon these objections to the instruction quoted, in their enumerated order. In common fairness to the learned judge who presided at the trial of this cause, it ought to be premised, we think, that the record fails to show any request by or on behalf of either party, that the court should instruct the jury in writing. It is manifest from the phraseology and diction of the instruction quoted, that the court instructed the jury orally, and that the instruction, as it appears in the bill of exceptions, was written by the official stenographer of the court, from his short-hand notes, and was not the composition of the presiding judge.

1. It is claimed by appellant’s counsel, that the court misstated the sixth paragraph of answer. We do not think the court’s instruction is fairly open to this objection or criticism. The court did not state at all the sixth paragraph of

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answer, except as coupled with the fourth and fifth paragraphs of answer. Of these three paragraphs, joined together by a copulative conjunction, the court spoke and gave, we think, a fair statement of appellant's defence as therein stated. If he thought the attention of the jury should be directed to the difference between the sixth paragraph of answer and the fourth and fifth paragraphs, he should have asked the court for an instruction covering the point. His first objection to the instruction quoted, we think, is untenable and presents no question of law for our decision.

2. It is next claimed by appellant, that the court's instruction invaded the province of the jury, and gave them to infer that certain necessary proof had not been made. This claim is founded upon the following excerpt from the instruction quoted: "That, before the defendant can successfully make out that kind of a defence, he should have pleaded in writing, as well as proved by a fair preponderance of the evidence, that he not only executed the note on Sunday, but that it was delivered and accepted by the plaintiff on Sunday." The law as declared in this extract from the court's instruction can not be, and is not, questioned by appellant's counsel in their briefs of this cause. The burden of the issues joined on the fourth, fifth and sixth paragraphs of his answer, was unquestionably on the appellant; and to maintain the defence pleaded in such paragraph, it was incumbent on him to prove by a fair preponderance of the evidence, that he not only signed the note in suit on Sunday, but that such note was delivered to and accepted by the appellee on Sunday. *City of Evansville v. Morris*, 87 Ind. 269 (44 Am. R. 763); *Kuhns v. Gates*, 92 Ind. 66.

It is insisted, however, by appellant's counsel, as we understand them, that, by the mood and tense of the verb, "should have proved," in connection with the context, the court told the jury, by implication, that appellant had not proved, etc., and thus invaded the province of the jury, who were the exclusive judges of what had or had not been proved.

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We do not think that the extract quoted from the court's instruction is fairly subject to the construction which counsel seek to place upon it. But if it were, we are of opinion that the entire instruction contains a correct statement of the law applicable to the case made by the pleadings and evidence. It is unfair to single out and assail a sentence from a long instruction, and the practice has been disapproved and condemned again and again in the decisions of this court. Instructions are to be taken and construed together, and if, as thus construed, they contain a correct statement of the law applicable to the case, they will afford no sufficient ground for the reversal of the judgment, even though a single sentence, standing alone and detached from its context, might seem to be erroneous. *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63, and cases cited. When the instruction quoted is considered as an entirety, we think it was impossible for the jury to be misled thereby, or to infer therefrom what appellant's counsel claim was implied therein.

3 and 4. We have carefully examined and considered the arguments of appellant's counsel in support of the third and fourth reasons assigned by them as above for claiming that the court's instruction quoted is clearly bad. Having reached the conclusion that the instruction, as an entirety, contains a fair and correct statement of the law applicable to the case, we can not hold the instruction erroneous because of any verbal inaccuracies or loosely worded expressions therein, which could not and did not, as it seems to us, prejudice or injure the appellant in any respect. Appellant's counsel have ably and elaborately discussed the several objections urged by them to the court's instruction, but, for reasons already given, we think that these objections are not well taken and ought not to be sustained.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Feb. 11, 1886.

Nelson v. The Board of Commissioners of Posey County.

No. 12,362.

NELSON v. THE BOARD OF COMMISSIONERS OF POSEY
COUNTY.

STATUTE OF LIMITATIONS.—*Claim by County Clerk for Extra Services.*—"Account."—An itemized claim by the county clerk for extra services is an "account" within the meaning of section 292, R. S. 1881, limiting the right of action thereon to six years.

From the Posey Circuit Court.

A. P. Hovey and G. V. Menzies, for appellant.

E. M. Spencer, for appellee.

MITCHELL, J.—On the 20th day of March, 1885, William Nelson, formerly clerk of the circuit court, and *ex officio* clerk of the court of common pleas of Posey county, filed an itemized account against the board of commissioners of the above named county, which aggregated \$784.90.

The account was duly verified, and the items consisted of charges for extra services in issuing certificates of allowances to jurors, copying and indexing orders for allowances, issuing venirees, empanelling and swearing grand juries, orders opening court, making bar-dockets, etc. It covered all the years from 1867 to 1873 inclusive.

An answer setting up the six years' statute of limitations was filed, and upon consideration the board of commissioners gave judgment dismissing the claim. An appeal was taken to the circuit court, where the same answer was refiled. The demurrer was overruled, and, the appellant refusing to reply, judgment was given against him for costs.

An act passed in 1861, found in 2 G. & H. 652, since repealed, provided "that the board of county commissioners shall annually allow the clerk and sheriff of their respective counties an annual compensation for extra services as such, not exceeding one hundred dollars each. But no such allowance shall be made to either of those officers until he shall have filed a detailed statement of his charges, with items and

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dates, and taken and subscribed an oath or affirmation to the truth thereof," etc.

Under section 292, R. S. 1881, actions "on accounts and contracts not in writing" are required to be commenced within six years after the cause of action accrues. Under section 294 all actions not otherwise limited are required to be brought within fifteen years.

It is contended that the six years' statute has no application to the account or claim filed, that this is an action not otherwise limited, and as a consequence the limitation which governs is fifteen years, under section 294. The argument in favor of this construction rests on the assumption that the phrase "on accounts," as mentioned in the statute, refers to the old common law action of account as it existed in the twenty-third year of the reign of James I.

The word "account" has no very clearly defined legal meaning. In *Rensselaer Glass Factory v. Reid*, 5 Cow. 587, 593, SANDFORD, C., said: "An account is no more than a list or catalogue of items, whether of debts or credits."

The primary idea of "account" is some matter of debt and credit, or of a demand in the nature of debt and credit between parties, arising out of contract, or of a fiduciary relation, or some duty imposed by law. It is none the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demands of debit and credit, provided the charges arise out of contract, express or implied, or from some duty imposed by law.

If the county was liable to the appellant, its liability grew out of the fact that he had performed certain services required of him, for which the law had fixed no certain compensation. The law imposed upon the board of commissioners the duty of annually allowing, within a certain limit, as they should deem proper, for such services, upon condition that the appellant should file a detailed statement of his charges, with items and dates. Such a statement constituted an account

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within the meaning of the statute. *Harris v. Christian*, 10 Pa. St. 233.

If the appellant was entitled to coerce the allowance of all or any part of such account, his right to do so accrued at the end of each current year, upon the making out and presentation of such statement or account. The statute could not be prevented from running by failing to make it out when the right to do so accrued.

In the case of *Moore v. State, ex rel.*, 55 Ind. 360, an action to recover from a clerk certain docket and unclaimed witness fees, the defendant successfully interposed the six years' statute of limitations. It was there held that an action for breach of duty for failing to pay over money as the law required was barred by the six years' statute. There was in that case neither contract nor mutuality of account, but the law imposed upon the clerk the duty of annually paying over all unclaimed witness fees, etc.

No reason occurs to us why the statute should not be held to apply in this case as in that, nor does it seem to us that the appellant's account for services against the county stands on any different footing from that of any other claim for services which the law made it the duty of the board to allow upon proper presentation.

The judgment is affirmed, with costs.

Filed Feb. 9, 1886.

No. 12,606.

SHULAR v. THE STATE.

CRIMINAL LAW.—*Change of Judge.*—*Application by One Jointly Indicted with Another.*—*Presence of Other Party.*—*Severance.*—Where one of two persons jointly indicted for murder separately applies for a change of judge, an order for such change may be made when the other party is not present, the effect of the application and order being to sever the defences.

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SAME.—Separate Trials.—Court may Suggest Propriety of.—Not only may parties jointly indicted be tried separately upon demand, but the court, when justice requires it, may suggest in express words the propriety of separate trials.

SAME.—Employment of Counsel to Assist Prosecuting Attorney.—Discretion of Court.—It is within the discretion of the trial court to direct the employment of counsel to assist the prosecuting attorney in conducting a trial against a person accused of felony.

SAME.—Statute.—The defendant in a criminal case, who asks the benefit of the provisions of a statute, must take the benefit just as the statute gives it.

SAME.—Murder.—Inspection of Place by Jury.—Absence of Accused.—Evidence.—The court may, without error, upon the request of the defendant in a prosecution for murder, send the jury, unaccompanied by the defendant, to inspect the premises where the homicide was committed, and such view does not constitute evidence in the case.

SAME.—Constitutional Law.—Section 1827, R. S. 1881, providing for a view of the place in which any material fact occurred, "with the consent of all the parties," is constitutional.

SAME.—Argument of Counsel.—Practice.—Misconduct of counsel in argument to the jury, to be available for the reversal of the judgment, must be of such a character as to injure the substantial rights of the defendant.

SAME.—Statements as to Collateral Matters.—Character of Accused.—A statement of the prosecuting attorney in argument, upon a merely collateral matter, which it is apparent does not injure the defendant, and also a statement, without more, that the character of the accused is shown by his own witnesses, will not justify a reversal.

SAME.—Impeachment of Witness.—Instruction.—It is not error to instruct the jury that in passing upon the credibility of a witness they may consider "his impeachment in any case where the witness is found to be successfully impeached."

SAME.—Misconduct of Jury.—Affidavits.—Supreme Court.—Practice.—Where misconduct of the jury is assigned as cause for a new trial, and affidavits and counter-affidavits are filed and evidence is heard, but on appeal only the affidavits in support of the motion are in the record, the question will not be considered.

From the Montgomery Circuit Court.

W. H. Thompson, W. B. Herod and J. West, for appellant.
A. B. Anderson, F. M. Howard, G. W. Paul, J. E. Humphries and W. W. Thornton, for the State.

ELLIOTT, J.—The appellant was jointly indicted with

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James Cunningham for the murder of William Lane. There were separate trials, and the appellant was convicted of manslaughter.

The trial court entertained a motion by Cunningham for a change of judge and made an order for a change at a time when the appellant was not present, and this ruling is assigned for error.

In our judgment the ruling was not erroneous. The statute expressly provides that parties jointly indicted may sever in their defences and may demand separate trials. The application for a change of judge by Cunningham was a declaration that he desired to sever in his defence, and that was a declaration he had a right to make whether the party jointly indicted with him was or was not present. It is not necessary for a party who claims a right to sever to make an explicit declaration of his election; it is sufficient if his acts are such as indicate an election to be separately tried.

One of two defendants jointly indicted has a right to apply for a change of venue, and the effect of granting the order is to sever the defences, leaving the defendant who does not apply for a change to be tried in the court where the indictment was found, and carrying the trial of the other defendant to the court to which the cause was ordered upon his application. *State v. Carothers*, 1 Greene, Iowa, 464; *State v. Martin*, 2 Iredell, 101; *State v. Wetherford*, 25 Mo. 439; *Hunter v. People*, 1 Scam. 453; *John v. State*, 2 Ala. 290; 1 Bishop Crim. Proced., section 75; Wharton Crim. Pl. and Pr. (8th ed.), sec. 602.

In *Brown v. State*, 18 Ohio St. 496, it was held that a change of venue upon the application of one of several defendants was proper, and that it operated as a severance. The court there said: "It seems quite clear to us that a motion by one of two persons jointly indicted, for a change of venue as to him alone, necessarily involves and includes a motion for a separate trial; and that the granting of such

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motion necessarily involves and includes the granting of a separate trial also."

As the motion made by Cunningham for a change of judge necessarily involved the declaration of an election to be tried separately, it follows that the appellant was not entitled to demand that he should be present when it was made and acted upon, since that matter concerned his co-defendant alone. Where there is a severance, it is not necessary that all who are jointly indicted should be in court when orders are made that affect one only of the defendants. It is, indeed, held by respectable courts, that the defendant need not be present when an application for a change of venue is made in his own behalf. *State v. Elkins*, 63 Mo. 159; *Hopkins v. State*, 10 Lea, 204; *Rothschild v. State*, 7 Texas App. 519. This rule is in harmony with the decision in *Epps v. State*, 102 Ind. 539, that a defendant need not be present at the hearing of motions, although he must be present on the trial. There are authorities supporting this doctrine, among them, *State v. Jefcoat*, 20 S. C. 383; *State v. Fahey*, 35 La. Ann. 9; *State v. Clark*, 32 La. Ann. 558; *State v. Harris*, 34 La. Ann. 118. We need not, however, go further in this instance than to declare that one of two defendants jointly indicted may apply for a change of judge, that the application involves a declaration of a demand for a separate trial, and that the presence of the person jointly indicted with the defendant, at the time the application is made or ruled on, is not required.

It is within the discretion of the trial court to direct the employment of counsel to assist the prosecuting attorney in conducting a trial against a person accused of felony. *Wood v. State*, 92 Ind. 269; *Siebert v. State*, 95 Ind. 471; *Tull v. State, ex rel.*, 99 Ind. 238; *Bradshaw v. State*, 17 Neb. 147; *State v. Montgomery*, 22 N. W. Rep. 639.

The trial court did the appellant no legal injury in appointing counsel to assist the prosecution, nor was there anything said in announcing its rulings upon that question, which

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trenched upon any of the appellant's rights. It is a mistake to suppose that one jointly indicted with another has a right to a joint trial; on the contrary, at common law the prosecution might demand separate trials, and under our statute any defendant may demand that a separate trial be awarded him. The court, when justice requires it, may suggest in express words the propriety of separate trials.

The court, on the motion of the appellant, sent the jury to inspect the premises where the homicide was committed, and did not direct that the defendant should be present when the inspection was made; but no request was made by the defendant that he should be allowed to be present, nor was there even a suggestion to the court that he desired to accompany the jury; nor did he, although he was present when the jury left the court-room, ask that he be permitted to go with them; nor did he object in any manner to their making the inspection. But the record shows more than this, for it shows that the court directed the attention of the defendant and his counsel to the statute, and stated that it required the consent of the parties, and inquired if they consented to the order, to which inquiry, as the record recites, the defendant's counsel responded "by renewing their request, and defendant indicated his assent."

Many authorities are cited by counsel in support of the general principle that the defendant must be present when evidence is given against him, and that this is the general rule we have no doubt; but the question here is whether the case is within the rule, not what the general rule is. Whether the case is within this general rule must depend upon the provisions of our statute and the conduct of the appellant.

Our statute provides that "Whenever, in the opinion of the court and with the consent of all the parties, it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for

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that purpose. While the jury are thus absent, no person, other than the officer and the person appointed to show them the place, shall speak to them on any subject connected with the trial."

This statute does not intend that the view of the premises where a crime was committed shall be deemed part of the evidence, but intends that the view may be had for the purpose of enabling the jury to understand and apply the evidence placed before them in the presence of the accused in open court. Deferring, for the present, the consideration of the authorities, and reasoning on principle, we shall have no difficulty in concluding that the statute does not intend that an inspection of a place where a crime was committed shall be taken as evidence. It can not be seriously doubted that evidence can only be delivered to a jury in a criminal case in open court, and, unless there is a judge, or judges, present, there can be no court. The statute does not intend that the judge shall accompany the jury on a tour of inspection; this is so obvious that discussion could not make it more plain. The jury are not, the statute commands, to be spoken to by any one save by the officer and the person appointed by the court, and they are forbidden to talk upon the subject of the trial. It is the duty of the jurors to view the premises, not to receive evidence, and nothing could be done by the defendant, or by his counsel, if they were present, so that their presence could not benefit him in any way, nor their absence prejudice him. The statute expressly provides who shall accompany the jury, and this express provision implies that all others shall be excluded from that right or privilege. It is quite clear from these considerations, that the statute does not intend that the defendant or the judge shall accompany the jury, and it is equally clear that the view obtained by the jury is not to be deemed evidence.

Turning to the authorities we shall find our conclusion well supported. The statute of Kansas is substantially the same as ours, except that it does not, as ours does, require the

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consent of all of the parties, and in a strongly reasoned case it was held that it was not error to send the jury, unaccompanied by the defendant, to view the premises where a burglary had been committed. BREWER, J., by whom the opinion of the court was prepared, said, in speaking of the statute: "Nothing is said in it about the presence of the defendant, the attorneys, the officers of the court, or the judge. On the contrary, the language seems to imply that only the jury and officer in charge are to be present. The trial is not temporarily transferred from the court-house to the place of view. They are 'to be conducted in a body' 'while thus absent.' This means that the place of trial is unchanged, and that the jury, and the jury only, are temporarily removed therefrom. Just as when the case is finally submitted to the jury, and they 'retire for deliberation,' there is simply a temporary removal of the jury. The place of trial is unchanged. And whether the jury retire to the next room, or are taken to a building many blocks away, the effect is the same. In contemplation of law the place of trial is not changed. The judge, the clerk, the officers, the records, the parties, and all that go to make up the organization of the court remain in the court room." *State v. Adams*, 20 Kan. 311.

The keenest scrutiny will disclose no infirmity in this reasoning, and it is in close agreement with that of our own court. In *Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind. 545, this court overruled the case of *Evansville, etc., R. R. Co. v. Cochran*, 10 Ind. 560, and adopted the views of the Supreme Court of Iowa, expressed in *Close v. Samm*, 27 Iowa, 503. That court, in speaking of a statute similar to ours, said: "It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no oppor-

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tunity for cross-examination or correction of error, if any, could be afforded either party." The doctrine of *Close v. Samm*, *supra*, was again expressly approved in *Heady v. Vevay, etc., T. P. Co.*, 52 Ind. 117, and it was said: "It results that the impression made upon the minds of the jurors does not constitute a part of the evidence in the cause." The case of *Jeffersonville, etc., R. R. Co. v. Bowen*, *supra*, was approved in *Gagg v. Vetter*, 41 Ind. 228 (13 Am. R. 322), and in *City of Indianapolis v. Scott*, 72 Ind. 196. In the case last cited it was said: "Perhaps, strictly speaking, the jury had no right to do anything more than to view the premises, thereby to enable them the better to apply the evidence given upon the trial."

Counsel refer us to *Carroll v. State*, 5 Neb. 1, where a different view is taken, but we can not yield assent to that decision. It is not a carefully considered case; not a single authority is cited, and there is no reasoning in support of the conclusion reached. The court there quote the statute and say: "This should be done in the presence of the prisoner, unless he decline the privilege, as he is entitled to have all the evidence received by the jury taken in his presence." Nothing more is said upon the subject, and the entire question is thus summarily disposed of. If our decisions are correct in holding that the view of the premises taken by the jury does not constitute evidence, that of the learned court from whose decision we have quoted must be wrong. In our investigation we have found two other cases which deserve a brief notice. In *State v. Bertin*, 24 La. Ann. 46, the jury were permitted to inspect the place where a burglary had been committed, and a witness for the prosecution was directed to accompany them and point out to them places marked on a diagram, and this was held to be error. We need only say of that case, that the permission given a witness to explain a diagram to the jury was permission to give evidence in the absence of the accused, and that there was not, in Louisiana, any statute allowing a jury to make an in-

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spection. These two characteristics plainly mark the difference between that case and this. The case of *Benton v. State*, 30 Ark. 328, is not so easily disposed of, but we think that it falls into the same error as the court did in *Carroll v. State*, *supra*, of regarding the inspection of the jury as evidence. If it is not evidence, and so our cases declare, the ground falls away from the assumption upon which the whole argument of the case rests, and we concur with the court in *Adams v. State*, *supra*, in declining to assent to it. *Benton v. State*, *supra*, is, however, addressed to the constitutional phase of the subject, of which we shall hereafter speak, and does not consider the effect of such a statute as ours. It can not, therefore, be deemed an authority upon the construction and effect of the statute, since it does not profess to discuss that subject. Mr. Wharton, in a single sentence disposes of the question, citing the case of *Benton v. State*, *supra*, and, of course, must be understood as referring to the procedure in jurisdictions where there is no statute regulating the subject. Wharton Crim. Law (7th ed.), section 3160.

Thus far we have considered the question immediately under examination without reference to the important provision of our statute, that the view can only be ordered upon "the consent of all the parties," as well as without reference to the important fact that the appellant himself requested that the jury be directed to view the premises where the homicide was committed. As the defendant asked the benefit of the provisions of the statute, he must take the benefit just as the statute gives it. In discussing, as we shall presently do, the constitutional phase of the question, we shall refer to authorities which fully sustain this proposition. The statute here under discussion grants a privilege upon condition that only the persons designated by the court shall accompany the jury, and the defendant has no right to assail the action of the court in obeying the provisions of the statute which he himself invoked. The reasoning of the court in *People v. Bonney*, 19 Cal. 426, forcibly applies to the phase of the question which

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we are here discussing, as well as to other questions in the case. It was there said: "The court had the discretion to permit the jury to view these physical objects; and this was neither in contemplation of the act or otherwise any part of the trial. It was rather a suspension of the trial to enable the jury to view the ground, etc., that they might better understand the testimony. We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with the acts, observations or conclusions of the jury. If he had desired to see the ground that he might be assisted in his defence by the knowledge thus obtained, possibly the court would have granted him the privilege; but the fact that the jury went upon the ground without being accompanied by him is no good reason for setting aside the verdict, especially as he neither made objection nor asked permission to accompany them at the time."

We come now to the constitutional phase of the question. We are to be governed by the provisions of our State Constitution, and are not controlled by the Federal Constitution, for the reason that the procedure in trials for offences against the laws of the State is not governed by the provisions of the National Constitution except in cases where the States are named. This is settled law. *Butler v. State*, 97 Ind. 378; *State v. Boswell*, 104 Ind. 541, and authorities cited.

The provision of the bill of rights, conferring upon an accused the right to be confronted by the witnesses, is not infringed by a statute which confers upon a defendant the right to waive the privilege of being confronted in open court by the witnesses of the State. Two things concur in such a statute, the waiver by the accused, and the consent of the State that its citizens may make such a waiver. The rights secured by the Constitution are fundamental, but they may, where the statute so provides, be waived by the accused. "These rights may be separated into two classes, namely, those in which the public generally, and as a community, is interested, as well as the individual to whom they happen directly to apply in any

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particular instance ; and those, more in the nature of privileges, which are for the benefit of the individual alone, and do not in any way affect the general public, whether the individual avails himself of them or not." Waiver of Constitutional Rights in Criminal Cases, 6 Crim. Law Mag. 182.

The provision in the twelfth section of the bill of rights, securing to one accused of crime the privilege of being confronted by the witnesses, belongs to the second of the two classes named, and is a privilege which may be waived.

In *Boggs v. State*, 8 Ind. 463, it was held that an objection that a deposition was taken without the consent of the accused, was waived by a failure to make it in the trial court. The rule, as declared in the case of *Butler v. State*, *supra*, is that a defendant who elects to take depositions under the statute concedes to the State a like privilege, thus waiving his constitutional privilege. This doctrine is firmly supported by the authorities. In addition to those cited in that case may be cited the following : *Williams v. State*, 61 Wis. 281 ; *Wills v. State*, 73 Ala. 362 ; *State v. Wagner*, 78 Mo. 644 (47 Am. R. 131) ; *Hancock v. State*, 14 Texas App. 392.

A striking illustration of the doctrine that a defendant in a criminal case may waive a constitutional right is supplied by those cases which hold that where an accused takes a new trial under a statute, he waives his right to insist upon the constitutional provision prohibiting a citizen from being put in jeopardy twice for the same offence.

In *Veatch v. State*, 60 Ind. 291, the theory of the appellant was, that, having been tried on an indictment charging him with murder, and having been convicted of manslaughter, he could not again be tried for murder, but the court denied the correctness of the theory, and held that he might be tried for the greater offence. It was there said, among other things : "Now, it would seem, that, if a party takes a new trial in a criminal case, he takes it on the terms prescribed by the statute, and consents to be placed 'in the same position as if no trial had been had.'" Other cases assert a like doctrine. *Mor-*

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ris v. State, 1 Blackf. 37; *United States v. Perez*, 9 Wheat. 579; *State v. Davis*, 80 N. C. 384; *Com. v. Arnold*, 6 Crim. Law Mag. 61; *Lesslie v. State*, 18 Ohio St. 390; *Livingston's Case*, 14 Grat. (Va.) 592; *United States v. Harding*, 1 Wall. Jr. 127; *State v. McCord*, 8 Kan. 232 (12 Am. R. 469).

Another illustration is supplied by the cases which hold that where the statute so provides a jury trial may be waived. *Murphy v. State*, 97 Ind. 579; *In re Staff*, 6 Crim. Law Mag. 828.

The cases which hold that an accused may voluntarily waive his right to be present at the trial, or may forfeit it by misconduct, furnish still further illustrations of the doctrine we are considering. *McCorkle v. State*, 14 Ind. 39; *State v. Wamire*, 16 Ind. 357; *Fight v. State*, 7 Ohio, 180; *Barton v. State*, 67 Ga. 653 (44 Am. R. 743); *United States v. Davis*, 6 Blatch. 464. It would not be difficult to add many authorities to those we have cited, but we deem them amply sufficient to sustain our proposition that the statute under discussion is not unconstitutional.

Assuming, as we feel satisfied we may do, that the statute is constitutional, and assuming that we have correctly construed the statute, there can be no question that the trial court committed no error in sending the jury, at the appellant's request, to view the place where the homicide was committed.

A new trial is asked upon the ground that one of the counsel for the State was guilty of misconduct in the argument to the jury. There are different phases of this question, and we will dispose of them as they are presented by the record. The bill of exceptions thus presents one phase of the question: "Mr. Anderson in his closing argument said: 'Mr. Thompson talks about the kindness with which he treated the memory of Billy Lane; that he did not attack it, and only brought out the conduct of Billy Lane, on the night he was killed, because it was a part of the transaction and circumstances culminating in his death. Gentlemen of the

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jury, if Mr. Thompson could have found any proof to show anything against the character of Billy Lane, he had the right to introduce it. He had the right to prove that Billy Lane was a desperate, quarrelsome and dangerous man. Any evidence of that kind would have been competent and proper. But we, gentlemen of the jury, were precluded by the law from attacking the character of defendant. We were not allowed to show what the character of defendant was.' Whereupon the defendant's counsel objected that the State's attorney was improperly commenting upon the character of the defendant, and was endeavoring to argue by innuendo that the character of the defendant was bad. Whereupon the court remarked that 'The character of the defendant is not in question and is not to be commented upon.' The said Albert B. Anderson thereupon said: 'I have not commented upon his character; I was just going to say, gentlemen of the jury, that while we were precluded by the law from showing what the character of the defendant was, it appeared in evidence from the defendant's own witness what the character was.' To which last statement of the said Albert B. Anderson, and also to the whole of the aforesaid statement so made the defendant at the time excepted."

So far as the prosecuting attorney's comments upon the right of the defendant to show the character of the deceased are concerned, we need only say that no fault can be found with them, for it is the law that, in the particulars named, the character of the deceased may be proved, and it was not an unreasonable inference that if it had been bad the defendant would have given evidence to that effect.

Nor was the counsel in error in saying that the State had no right to attack the character of the defendant, although, as the court rightly directed the jury, his character was not "in question, and is not to be commented on." Nor was there material error in the statement that the character of the accused was shown by the testimony of his own witnesses. There are cases where the character, or, more strictly speak-

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ing, the disposition, of a person accused of crime, may appear from the testimony, and there was evidence in this case tending to show the disposition of the defendant. Where facts are before a jury, it is proper for counsel to draw inferences from them, and even though they proceed illogically the error will not require or justify a reversal. It is not easy to define the boundary between fair debate and misconduct, but we can not say that the line was passed in this instance in what was said as to what the evidence established.

In the case of *Proctor v. DeCamp*, 83 Ind. 559, we said: "There was evidence, in the case before us, upon which the appellee's counsel had a right to comment. Granting that he drew from it an unauthorized conclusion, or that he gave it a wrong coloring and meaning, he was still within the evidence, and when this is so courts can not interfere. If counsel go beyond the evidence and bring in foreign and unproved matters, courts should interfere, and if the trial court does not interfere, and the matter improperly brought before the jury is of a material character, the appellate court may reverse the judgment. But it is not every violation of the rules governing the discussion of causes before the jury that will entitle the complaining party to have the verdict set aside; for if the statement be an unimportant one, or one not likely to wrongfully influence the jury, the verdict will be upheld." This is the rule declared and enforced in *Combs v. State*, 75 Ind. 215, in *Morrison v. State*, 76 Ind. 335, in *Epps v. State*, 102 Ind. 539, and in *Anderson v. State*, 104 Ind. 467.

This case differs very materially from the cases of *Brow v. State*, 103 Ind. 133, and *Bessette v. State*, 101 Ind. 85, for in those cases the counsel did not simply draw a wrong inference from the facts, or erroneously state a proposition of law, but in one of these cases the counsel assumed the position of a witness by stating very material facts, and in the other the counsel not only usurped the place of a witness, for he also singled out and assailed one of the jurors. There is still another distinguishing feature, and that is this, here the

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court correctly stated the law to the jury, saying that the question was not before them, and must not be discussed; while in the cases referred to the court declined to interfere, and neither corrected nor rebuked the counsel.

The other phase of the question presented by the assignment in the motion for a new trial, that the State's counsel was guilty of misconduct, is of a somewhat different character from that just discussed, but, still, we think that it falls within the same general principles. The facts upon which the alleged improper statement of the counsel for the State was based were collateral to the principal and controlling questions in the case, and the statement was made in response to a statement of defendant's counsel.

We do not think that it can be justly said that the statement of the prosecuting attorney upon a merely collateral matter worked an injury to the substantial rights of the appellant, and it is only in cases where there is a substantial injury to the appellant that we can reverse. As was said in *Morrison v. State, supra*, "If, for every transgression of the prosecuting attorney beyond the bounds of logical or strictly legal argument, the defendant could claim a new trial, few verdicts could stand, and the administration of criminal justice would become impracticable." What was said in *Combs v. State, supra*, bears so directly upon the question as we here encounter it, that we quote from the opinion in that case: "If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. Common fairness requires that courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel, during the argument, may have made some general statements not supported by evidence. Of course, there may be cases where the matters stated are so weighty and important as to do the accused injury, and, whenever this is so, the appellate court should not hesitate to adjudge a reversal."

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In this instance it is evident that from the character of the counsel's statement, from the matter upon which it was based, and from the cause which called it out, that we ought not to reverse the judgment of the trial court.

We have given the evidence a careful study, and are convinced that the defendant was convicted of the lowest grade of homicide that the law and the evidence will warrant. There is evidence strongly tending to show that the killing was not only malicious, but that it was also premeditated. The first quarrel between the appellant and the deceased took place quite a long interval of time before the fatal shot was fired, and there is evidence strongly tending to show that the appellant, after leaving the place where the first quarrel occurred, returned for the purpose of renewing it and of doing the deceased great bodily harm, if not of taking his life. If the evidence adduced by the State was credited by the jury, and to us it seems far more credible than that adduced on the part of the defence, the verdict of manslaughter is a mild one, and was not influenced in any degree by the remark of the prosecutor.

The trial court should promptly check any departure from fair debate, and if the departure is a grave one, sternly rebuke, or, if need be, punish the counsel, but it does not follow from this that in every instance, where there is a transgression of the rules that govern in the argument of causes, there should be a reversal. As the cases to which we have referred decide, the appellate court can only interfere where substantial injury has been done the party, but the trial court may, and should, always keep counsel within the bounds of legitimate argument. If counsel undertake to state matters not in evidence, or to state facts which could not be put in evidence, the trial court should restrain them by a quick and sharp rebuke, but the omission of the trial court to do its duty, while it may be a just reason for criticism, will not always entitle the accused to a judgment annulling the verdict.

There was no error in directing the jury, as the court did

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in the fifteenth instruction, that in passing upon the credibility of a witness they might consider "his impeachment in any case where the witness is found to be successfully impeached." It seems clear that unless a witness is successfully impeached he is not impeached at all. An attempt to impeach that results in a failure can not be regarded as impairing the credit of a witness. The court did not, as counsel assume, tell the jury that they should not consider evidence offered to impeach a witness, but informed them that in deciding upon the credibility of a witness they might consider his impeachment; if he was found to be successfully impeached. This was simply affirming that if the witness was impeached they might consider that matter as affecting his credibility—for the language used conveys this meaning and none other—since an attempt to impeach that is not successful goes for nothing. Of course, it is for the jury to determine whether the witness is impeached, as well as to determine all other matters affecting his credibility; but there is nothing in the instruction that conflicts with this principle. The matter of the credibility of witnesses was not taken from the jury.

It is contended with much ability by appellant's counsel, that the judgment should be reversed, for the reason that the jury were guilty of misconduct, but the question can not be considered by us, because it is not properly presented by the record. The record shows that the defendant filed affidavits with his motion for a new trial; that the State asked leave to file counter affidavits and to subpoena the jurors who tried the case; that the defendant unsuccessfully objected to granting the request of the State; that the court heard the evidence upon the motion at the appointed time; that a stenographer was appointed to take the testimony; that the investigation occupied several days, and that the court, after "being duly advised," overruled the appellant's motion. No affidavits are in the record except those filed with appellant's motion for a new trial, nor is the evidence given on the hear-

The State v. Soudriette *et al.*

ing of that motion in the record. This statement of the condition of the record shows that there is nothing more than the affidavits on one side of the controversy before us, and we can not presume that the statements made in them were not completely met and overthrown by the evidence adduced by the State; on the contrary, we are imperatively required to presume in favor of the ruling of the trial court.

Judgment affirmed.

Filed Feb. 9, 1886.

No. 12,788.

THE STATE v. SOUDRIETTE ET AL.

RECOGNIZANCE.—*Defects do not Invalidate.*—*Forfeiture.*—*Mayor of City.*—*Criminal Law.*—Although a recognizance taken by the mayor of a city, for the appearance before him of one charged with felony, is by mistake made payable to the city, instead of to the State, and to answer a charge of having violated "an ordinance of said city," instead of a statute of the State, it is valid and binding, and upon forfeiture may be enforced by the State. Sections 1221 and 1715, R. S. 1881.

From the Knox Circuit Court.

W. A. Cullop, Prosecuting Attorney, *G. W. Shaw* and *C. B. Kessinger*, for the State.

Howk, J.—This was a suit by the State of Indiana upon a forfeited recognizance, executed, as alleged, by the appellees, Charles H. and Ebare Soudriette. The appellees severally demurred to the State's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. The State excepted to this ruling, and, declining to amend its complaint or plead further, the court adjudged that it take nothing by its suit.

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The State has appealed, and has here assigned as error the sustaining of appellees' demurrer to its complaint.

It was alleged by the State in its complaint herein, that on the 22d day of August, 1885, the appellee Charles H. Soudriette having theretofore been charged at Knox county, Indiana with having obtained goods under false pretences upon affidavit filed before John Wilhelm, mayor of the city of Vincennes, in such county, and having been duly arrested by the marshal of such city, on a warrant issued by the mayor on such charge, he, with the other appellee, executed to the State of Indiana the recognizance for his appearance before such mayor, in the words and figures following, to wit:

"State of Indiana, Knox County, City of Vincennes, set.

"We, the undersigned, hereby acknowledge ourselves, jointly and severally, bound and indebted to the city of Vincennes in the sum of one hundred dollars, if Charles H. Soudriette shall fail to appear before the mayor of said city at his office therein, on the 22d day of August, 1885, at 8 o'clock A. M., to answer the charge of having violated an ordinance of said city, and abide the order of said court. Witness our hands this 21st day of August, 1885.

(Signed)

"C. H. SOUDRIETTE.

"EBARE SOUDRIETTE.

"Approved: JOHN WILHELM, Mayor."

And the State alleged that such recognizance was then and there taken and duly approved by said mayor; that thereupon, on the 22d day of August, 1885, the said Charles H. Soudriette did not appear in discharge of such recognizance, but made default therein and failed to appear or respond to the call of the court, and that after having been called, and failing to appear or respond to such call, the recognizance was duly declared forfeited to the State of Indiana, and that such forfeiture, taken as aforesaid, was recorded on the back of said bond in the words and figures following, to wit:

"State of Indiana, City of Vincennes, ss. :

"I, John Wilhelm, do hereby certify that the within named

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Charles Soudriette did not appear in discharge of his recognizance, and abide the judgment of the court, as was required by the terms of the within bond; thereupon said Soudriette was thrice called, but came not, and wholly defaulted. Thereupon his recognizance was declared forfeited. August 22d, 1885. (Signed) JOHN WITHELM, Mayor."

And the State further said that there was a clerical error in the making of said bond, in this, that from such bond as drawn, it appeared that the appellees were bound unto the city of Vincennes to answer the charge of having violated a city ordinance; that such bond should have read, "bound unto the State of Indiana, to answer the charge of having obtained goods under false pretences," as that was really the charge the appellee Charles H. Soudriette was arrested upon and the charge for which such bond was given for his appearance before said mayor, at said time. "Whereby a right of action has accrued unto the State of Indiana on said bond, and it prays judgment in the sum of one hundred dollars."

From the foregoing summary of the facts stated in the State's complaint in the cause now before us, it is manifest that the question for our decision, as the case is now here presented, may be thus stated: May the State, upon the facts stated and admitted to be true, recover upon the forfeited recognizance, set out in the complaint, notwithstanding the singular and extensive "clerical errors" therein? Under the jeofail provisions of our civil code, we are of opinion that this question must be answered in the affirmative. Appellees' counsel has not seen proper to favor us with any brief or argument in support of the ruling of the circuit court, and we have not been advised, in any mode, of the grounds upon which that learned court based its ruling. Of course, the case under consideration is a civil action, although it is prosecuted by and in the name of the State of Indiana, as the plaintiff therein.

In section 1221, R. S. 1881, which is substantially, and almost literally, a re-enactment of section 790 of the civil

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code of 1852 (2 R. S. 1876, p. 311), it is provided as follows: "No official bond entered into by any officer, nor any bond, recognizance, or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance, or written undertaking to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance, or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance, or written undertaking were perfect in all respects."

In section 141 of the criminal code of 1881, which was approved twelve days after the approval of the civil code of 1881, and must be regarded under our decisions as the later expression of the legislative will, although both of such codes took effect and became laws on the same 19th day of September, 1881, which section 141 is section 1715, R. S. 1881, it is provided as follows: "No recognizance, undertaking, or bond taken in any criminal proceeding shall be void for want of form or of substance, or for omission of any recital or condition, or because the same was entered into on Sunday; nor shall the principal or surety be discharged, but the principal and surety shall be bound by such recognizance, undertaking, or bond to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in such recognizance, undertaking, or bond. And no action upon such recognizance, undertaking, or bond shall be defeated for any want of form or substance, or for the omission of any recital or condition, or because the same was entered into on Sunday, or for the neglect of the clerk to endorse or record it, but the recognizers shall be bound thereby, to the full extent specified therein. A recognizance may be recorded after execution has been awarded."

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This section of the criminal code was manifestly constructed from or out of section 1221, above quoted, or section 790 of the civil code of 1852, and some of its provisions seem to be out of place, to some extent at least, in a code regulating "proceedings in criminal cases." It may be said, however, that the provisions of sections 1221 and 1715, above quoted, are so nearly identical with the provisions of section 790 of the civil code of 1852, that the decisions of this court, construing and applying the provisions of the latter section to cases somewhat similar to the one at bar, may well be regarded as authorities in determining the question of the sufficiency of the facts averred in the State's complaint herein, to constitute a cause of action. In *Hawes v. Pritchard*, 71 Ind. 166, after quoting some of the provisions of section 790 of the code of 1852, the court said: "The effect of these provisions of section 790 of the code, upon informal or defective bonds, recognizances or written undertakings, taken by an officer in the discharge of the duties of his office, has of late been the subject of full consideration by this court, in a number of cases; and it has been uniformly held, as we now hold, that the effect of these statutory provisions is to legalize and validate the bond, recognizance or written undertaking in question, and make of it just such an instrument as was contemplated and called for by the terms of the statute, under which it appeared to have been executed." *Railsback v. Greve*, 58 Ind. 72; *Miller v. McAllister*, 59 Ind. 491; *Turner v. State, ex rel.*, 66 Ind. 210; *Graham v. State, ex rel.*, 66 Ind. 386; *State, ex rel.*, v. *Wyant*, 67 Ind. 25. To the same effect substantially, there are many more recent decisions of this court. *Miller v. O'Reilly*, 84 Ind. 168; *State, ex rel.*, v. *Britton*, 102 Ind. 214, and the cases there cited.

Applying the statutory provisions above quoted, construed as they have been by the decisions of this court above cited, to the complaint in the case in hand, we are of opinion that the facts stated in such complaint, and admitted to be true, as the case is now presented, are sufficient to constitute a

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cause of action in the State's favor upon the recognizance in suit, and to withstand the appellees' demurrer.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule the demurrer to the complaint, and for further proceedings.

Filed Feb. 10, 1886.

No. 12,878.

THE BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY
v. COURTNEY.

COUNTY COMMISSIONERS.—*Liability for Services of Attorney Appointed by Judge to Defend Criminal.*—Although the county commissioners possess no power to contract with an attorney to prosecute or defend a criminal, yet it is within the power of the circuit judge to bind the county to pay for services rendered by an attorney under appointment by such judge, in defence of a prisoner who is found entitled to defend as a poor person.

SAME.—*Failure of Judge to Make Allowance.*—The failure of the court, under the order of which an attorney performs services in defence of a prisoner, to make an allowance therefor, does not discharge the county from its obligation to pay.

SAME.—*Appointment of Attorney after Change of Venue.*—Where the court to which a criminal case is taken for trial on a change of venue appoints an attorney to defend the prisoner, the county in which the case originated is liable to the same extent as if the appointment had been made and the case tried in that county.

SAME.—*County Liable for Services in Supreme Court.*—Under such appointment, the county is liable not only for services in the trial court, but also for the services of the attorney in preparing and prosecuting an appeal to the Supreme Court.

SPECIAL JUDGE.—*Regularity of Appointment. — Presumption on Appeal.*—Where no objection to the sitting of a special judge was made until after verdict, it will be presumed on appeal, in the absence of any facts showing that he was not authorized to sit, that the proceedings were regular.

From the Parke Circuit Court.

J. H. Burford, for appellant.

J. R. Courtney, for appellee.

105	311
130	21
130	228
105	311
148	426
148	427
148	428
105	311
154	290

The Board of Commissioners of Montgomery County v. Courtney.

MITCHELL, J.—On the 8th day of December, 1882, the grand jury of Montgomery county returned an indictment against Joseph Stout, for murder in the first degree.

The venue of the cause was changed from Montgomery to Parke county, where a trial was had, the Hon. James E. Heller presiding as judge *pro tempore*. The prisoner applied for admission to defend *in forma pauperis*, and being so admitted, upon request, John R. Courtney, Esq., was assigned by the presiding judge as his attorney and counsellor. The trial resulted in a conviction, and an appeal was prosecuted to this court, the attorney appointed rendering the services necessary in prosecuting the appeal.

On the 23d day of November, 1883, Mr. Courtney filed a claim before the board of commissioners of Montgomery county for his services in preparing the case for appeal, briefing and orally arguing the same in this court, and for expenses while engaged in the service of the prisoner in matters pertaining to the appeal.

The claim recited the appointment, and exhibited a certified copy of the application to the court for such appointment, and the order of the court appointing and assigning the claimant as attorney and counsellor for the accused, together with a bill of particulars of the services and charges.

Upon consideration the board of commissioners refused to allow any part of the claim. The claimant appealed to the Montgomery Circuit Court. The venue of the cause was subsequently changed, and the cause tried by a jury, the Hon. Ared F. White, sitting as special judge, in Parke county. The trial resulted in a verdict and judgment in favor of the claimant for \$550. From this judgment the board of commissioners appealed. Two questions are presented by the argument for consideration here.

It is insisted that the court erred in overruling a demurrer filed in the circuit court to the complaint:

1. Because the court had no jurisdiction of the subject-matter of the action.

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2. Because the complaint did not state facts sufficient to constitute a cause of action against the county.

The argument of appellant is predicated on the proposition that the board of commissioners is a court of limited statutory power, and that it has no jurisdiction to make an allowance in respect to any matter for which, within its authority, it could have made no contract. *Miller v. Embree*, 88 Ind. 133; *Moon v. Board, etc.*, 97 Ind. 176, and other cases holding the rule substantially as above stated, are referred to and relied on. Because, therefore, within the ruling in *Hight v. Board, etc.*, 68 Ind. 575, and *Board, etc., v. Ward*, 69 Ind. 441, a board of commissioners has no power to contract with an attorney to prosecute or defend criminals, it is contended the conclusion follows that the board possessed no power or jurisdiction to allow the claimant who was appointed by the court for such service.

Claims against a county arise either out of contract, or from some duty or obligation which the law imposes. Whoever asserts and undertakes to enforce a claim against a county, which pertains to its business, and which must necessarily arise out of contract, must, within the rulings referred to, show a contract made with the board, or some duly authorized agent, and the contract must appear to have been one which it was within the authority of the board to make. *Waymire v. Powell, post*, p. 328. There are, however, many claims of which the board of commissioners are required to take cognizance, which grow out of a duty imposed by law, or from the act of some officer who is authorized by law to create an obligation against the county. Township trustees as such, and as overseers of the poor, may, under certain circumstances, bind the county in reference to matters concerning which the county commissioners are not authorized to contract. Accordingly it has been held that a township trustee may bind the county for services rendered in the way of temporary relief to a person in distress, who is without friends and money, as in the case of *The Board, etc., v. Jen-*

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nings, 104 Ind. 108. Other illustrations and cases might be cited, but this is sufficient to show the distinction between the cases relied on by counsel and that under consideration.

The question here is, was it within the power of the circuit judge to bind the county to pay for the appellee's services by appointing him to defend a prisoner who was found to be entitled to defend as a poor person, notwithstanding the county commissioners were without power to contract for such services? That it was, we think, can not be doubted. Upon the same principle that the law has committed to the overseers of the poor the duty of determining who shall receive temporary relief when in distress, and to bind the county to persons who care for such persons; so it has committed to the courts the duty of deciding who shall be entitled to defend as poor persons, and to bind the county for services rendered by an attorney in behalf of such persons, in pursuance of an appointment duly made.

Section 260, R. S. 1881, expressly authorizes the court, upon being satisfied that a person has not sufficient means to prosecute or defend an action, to assign him an attorney, and it was held in *Webb v. Baird*, 6 Ind. 13, that the circuit court, even without a statute, had the power, *ex necessitate*, to appoint an attorney to defend a poor person. It was there held, upon the authority of *Gaston v. Board, etc.*, 3 Ind. 497, and *Allegheny County v. Watt*, 3 Pa. St. 462, that the judge who appoints counsel for a poor person was to that extent the agent of the county. The case cited was followed and approved in the following cases: *Board, etc., v. Wood*, 35 Ind. 70; *Gordon v. Board, etc.*, 52 Ind. 322; *Tull v. State, ex rel.*, 99 Ind. 238.

Whether section 260 is applicable to criminal procedure need not be determined. Whether applicable or not, it is nevertheless beyond question that without it the inherent power of the court was ample to justify the appointment.

There could be no propriety or fitness in authorizing or permitting the board of commissioners, an inferior tribunal,

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to employ counsel either to defend or prosecute actions in the circuit court or other courts of superior jurisdiction, and, therefore, the Legislature has wisely withheld that power from county boards, and committed it in express terms to the courts. It must be supposed that the court in which an action is pending is better able to judge of the necessity for assigning counsel to prosecute or defend than any other tribunal, and that the orderly course of justice would not be obstructed by permitting a trial to proceed without the assignment of counsel when found necessary. Without a statute such courts possess the power, to the end that justice may be administered. *Webb v. Baird, supra.*

Having the authority to assign counsel, it results, necessarily, that courts may impose upon the proper county the obligation to pay for such services. That it was within the legislative intent that such an obligation should arise, was not left to inference. Section 1415, R. S. 1881, provides, among other things, that the courts may make allowances "to persons performing any services under the order of the court," and section 1414 makes it the duty of the auditor to draw his warrant upon the treasurer for any sum allowed or certified to be due by any court having jurisdiction beyond that of justices of the peace. It thus appears that the compensation for such services is a charge against, and is payable out of, the county treasury. In the orderly course, it should be audited and allowed by the court, but the services having been performed upon the order of the court, the obligation of the county to pay exists nevertheless, and the failure of the court to make the allowance does not discharge the county from its obligation.

It was held in the case of *Board, etc., v. Summerfield*, 36 Ind. 543, that allowances thus made by the court were not conclusive upon the rights of the persons affected thereby; they are only *prima facie* correct. Since the amount fixed by the court is not, and could not be, conclusive as an adju-

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dication, the failure to allow anything does not deprive the claimant of his rights.

That the case in which the services were rendered was tried in Parke county, and that the appointment of the appellee was made in that county, does not make it different.

The case having originated in Montgomery county, and having been taken thence by change of venue to Parke county, the expenses of the trial, as specified in section 1778, R. S. 1881, and such as come "justly and equitably within its provisions," are to be audited and allowed by the court, and the county from which the change was taken becomes liable for their payment. We think the charge for services for defending the accused comes "justly and equitably" within the provisions of section 1778.

As before suggested, the failure of the court to audit and allow the claim can not deprive the person rendering services, under a specific appointment by the court, of the right to compensation, nor discharge the obligation of the county to pay. When audited and allowed by the court, and duly certified, no discretion remains with the auditor to whom the account is certified. *Gill v. State, ex rel.*, 72 Ind. 266. If the claim had been audited by the court, possibly the only way to have secured a correction of the amount would have been by an application to the court. But as to this we need not decide.

We can not suppose that the Legislature intended that a necessary, and in many cases indispensable, part of the expense of a criminal trial coming from one county to another, should be borne by the county to which the change was taken. It therefore provided in section 1779 that "all costs and charges specified in the last preceding section, or coming justly and equitably within its provisions," etc., should be audited and allowed by the court. It may be a question whether sections 1778 and 1779 should not be construed in connection with the act of March 10th, 1873, Act 1873, p. 221. The appointment by the court in Parke county had,

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therefore, the same binding force upon the commissioners of Montgomery county as if the appointment had been made and the case tried in the latter county. *Gordon v. State, supra.*

That the services for which compensation was asked were performed in preparing and prosecuting an appeal to this court does not make the obligation of the county different. It was the attorney's duty, if in his judgment the interests of his client demanded it, to prosecute the appeal. His appointment to defend the accused constituted him his attorney until the case was ended, or the appointment revoked by the court which made it. *Stout v. State*, 90 Ind. 1.

The conclusion is thus reached that the objections taken to the complaint on demurrer were not well made, and the ruling of the court in that respect was not erroneous.

The fourth and only other assignment of error, which is not disposed of by what has been said, relates to the regularity of the appointment of the special judge who presided at the trial.

No objection to the presiding judge appears to have been made until after the trial had proceeded so far that the jury rendered a verdict in favor of the appellee. A docket entry copied into the record recites that the appellant then made objection to the entering of judgment on the verdict, because of the want of authority of the presiding judge. The record shows that a change of venue was taken from Judge Britton at the September term, 1884, and that the Hon. Ared F. White was appointed to try the cause, and that he was duly qualified and proceeded at the April term, 1885, with the trial.

As there is no bill of exceptions in the record, in which the facts appear, and as the trial proceeded to the point indicated with the consent of the appellant, we are bound to presume in favor of the regularity of the proceedings. The original appointment having been regularly made by Judge Britton, we must presume, until the contrary appears, that his appointee was properly continued, notwithstanding the

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incumbency of another regular judge of the court intervened by the creation of a new circuit. The successor to Judge Britton may have been disqualified to sit in the case. *Watts v. State*, 33 Ind. 237.

The judgment is affirmed, with costs.

Filed Feb. 12, 1886.

 No. 12,213.

DAVIS v. REAMER ET AL.

106	318
137	510

AGENCY.—*Authority to Receive Property at "Landing."*—*Wharf-boat.*—*Negligence.*—*Liability of Wharfinger.*—One who has authority to receive and take property from a "landing" has authority to receive and take it from a wharf-boat stationed and used at a particular wharf, and constituting one of the landing facilities, and for the negligence of his agents in removing the property from the boat, resulting in the loss of such property, the owner of the wharf-boat is not liable.

INTERROGATORIES TO JURY.—*Answers to Must be Considered as a Whole.*—*General Verdict.*—Where the jury's answers to interrogatories, taken as a whole, are consistent with the general verdict, the latter will stand, although some answers separately are seemingly inconsistent therewith.

INSTRUCTIONS TO JURY.—*Harmless Error.*—*Practice.*—A judgment will not be reversed on account of an erroneous instruction which results in no injury to the appellant.

From the Floyd Circuit Court.

J. H. Stotsenburg and *J. V. Kelso*, for appellant.

A. Dowling, for appellees.

NIBLACK, C. J.—The appellees, Hiram J. Reamer and Madison M. Hurley, were the owners of a wharf-boat stationed at the wharf, otherwise known as the "landing," at the city of New Albany, in this State, and used as a warehouse in the storage of freight shipped to, as well as from, that city upon steamboats and other vessels navigating the Ohio river.

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The appellant, Hiram W. Davis, resided and was in business at the city of Cincinnati, in the State of Ohio, and at the time of the transaction hereinafter referred to, one Anderson was his travelling agent and salesman, engaged in the business of his agency at and in the vicinity of New Albany. Anderson ordered Davis to ship a lot of buggies and perhaps other vehicles to him at New Albany, and requested one Philip M. Kepley, the proprietor of a livery stable, to receive and take charge of the vehicles when they arrived at New Albany. Davis accordingly shipped to Anderson's address at New Albany by steamboat, a lot of buggies, including a barouche worth \$200. Kepley intended to take the vehicles directly from the steamboat to his stable, so as to save the expense of storage, but they came to New Albany in the night time, and were put off onto the wharf-boat before he received notice of their arrival at that city. The appellees, however, made no charge for the storage of the vehicles. Charles A. Kepley, a son of Philip M. Kepley, being at the time his father's assistant and to some extent, at least, his business manager in connection with the livery stable, on the next morning took with him two other persons and went on board the wharf-boat for the purpose of taking the vehicles off and removing them to the livery stable. He and his assistants brought the barouche forward and left it standing for a few minutes on the floor between the two opposite and open doors of the wharf-boat, whence, by reason either of a gust of wind or of some sudden motion of the boat, the barouche ran off and into the river and was lost. Davis thereupon brought this action against Reamer and Hurley for the loss of the barouche, upon the ground that they had negligently and improperly permitted young Kepley to interfere with, and to assume control of the vehicles. At the first trial Davis recovered judgment, but that judgment was reversed by this court. See *Reamer v. Davis*, 85 Ind. 201. At a subsequent trial the jury returned a general verdict in favor of the appellees, together with answers to interroga-

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ories submitted to them at the request of the parties respectively.

In response to interrogatories addressed to them, at the request of the appellant, the jury answered substantially:

First. That the appellant was the owner of the barouche at the time it was lost.

Second. That the barouche was worth \$200.

Third. That neither Reamer nor Hurley did anything to make the barouche secure after it was placed between the two open doors of the wharf-boat.

Fourth. That neither Reamer nor Hurley said or did anything to prevent young Kepley and his assistant from removing the barouche from the place at which it was stored on the wharf-boat.

Fifth. That neither Reamer nor Hurley did anything towards having the barouche taken from the wharf-boat and delivered upon the adjacent landing.

Sixth. That if either Reamer or Hurley had arranged to have the wheels of the barouche chocked after it was brought out and placed between the doors of the wharf-boat, it would probably not have been lost overboard.

Seventh. That Philip M. Kepley expressly directed his son Charles to let the buggies and barouche alone, until the charges upon them were paid, and everything was arranged for their removal.

Eighth. That it was not shown that young Kepley had any authority to remove the buggies and barouche from the wharf-boat.

Ninth. That neither Reamer nor Hurley inquired as to the authority of young Kepley to remove the buggies and barouche from the wharf-boat.

Tenth. That the only authority which Philip M. Kepley had from Anderson was "to receive the carriages or buggies from the landing and save the expense of storage or wharfage."

Eleventh. That, in the opinion of the jury, Philip M. Kep-

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ley had no authority to receive the buggies and barouche from the wharf-boat.

Twelfth. That neither Philip M. Kepley nor the plaintiff ever received the barouche from the appellees.

In response to interrogatories submitted to them, at the request of the appellees, the jury answered, in effect:

First. That Philip M. Kepley was authorized by Anderson, as the agent of the appellant, to receive the buggies and barouche in controversy and to store them in his livery stable.

Second. That Philip M. Kepley was, at the time of the arrival of the buggies and barouche, the keeper of a livery stable, and that his son Charles A. Kepley was his agent and general manager, and man of business in his absence.

Third. That Charles A. Kepley, as the agent and representative of Philip M. Kepley, went upon the wharf-boat and proceeded to put the buggies and barouche into a condition to be removed.

Fourth. That the barouche was lost overboard in consequence of the acts and negligence of Charles A. Kepley and his assistants.

Fifth. That there was no evidence as to whether Philip M. Kepley denied the authority of his son to receive the barouche after notice of its loss.

Sixth. That Philip M. Kepley made no objection to anything that was done by his son, or the men who worked with him.

Seventh. That the appellant resided in Cincinnati.

Eighth. That it was not shown in what business the appellant was engaged.

Ninth. That all the remaining buggies were taken to Kepley's livery stable after the barouche was lost.

Tenth. That the same persons who prepared the barouche for removal, also prepared the buggies for removal and removed them accordingly.

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Eleventh. That the barouche was lost through the negligence of Charles A. Kepley.

Twelfth. That the loss of the barouche was occasioned by the acts of those representing Philip M. Kepley in the removal of the vehicles.

Thirteenth. That Anderson, as the agent of the appellant, made no objection to anything that was done by Charles A. Kepley concerning either the buggies or the barouche.

Fourteenth. That they, the jury, did not know what was the immediate cause of the loss of the barouche.

Upon a return of the verdict the appellant moved for judgment in his favor upon the answers of the jury to the special interrogatories, upon the ground that some of those answers were inconsistent with the general verdict, but that motion being overruled, he then moved for a new trial, and that motion was also denied. These rulings were succeeded by an entry of judgment for the appellees upon the general verdict.

It is claimed that as the jury found that Philip M. Kepley had authority only to receive the vehicles at, and to take them from the "landing," he necessarily had no authority to take charge of them at the wharf-boat, and that, consequently, Charles A. Kepley, who assumed to represent his father in taking control of the barouche at the wharf-boat, was nothing more than a volunteer and an intermeddler, for whom the appellant was in no manner responsible. We regard this argument as based upon a distinction which involves no substantial difference. It is a matter within the common knowledge of all men that a wharf-boat, stationed and used at a particular wharf, is for all the purposes of commerce a part of the wharf itself, so long as it continues to be so stationed and used. It constitutes one of the landing facilities at the wharf, and the landing of a vessel along-side of and against such a wharf-boat is, in legal contemplation, a landing at the wharf to which it is attached.

The conclusion of the jury that, in their opinion, Philip

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M. Kepley had no authority to take the buggies and barouche from the wharf-boat was, therefore, in view of their preceding and other findings of facts, more a conclusion of law than the finding of a fact, and hence was not substantially inconsistent with the general verdict. *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

As a careful examination of all the answers to the special interrogatories will disclose, those seemingly inconsistent with the general verdict are antagonized by other answers which fully sustain the general verdict. Under such circumstances the answers, considered as they ought to be as a whole, can not be either accepted or treated as inconsistent with the general verdict. *Hereth v. Hereth*, 100 Ind. 35.

In one of its instructions to the jury the circuit court assumed to state the substance and effect of the testimony of some of the witnesses upon a given point involved at the trial. This, under our practice, was technically erroneous, but, taken in connection with all the other proceedings at the trial, we think no material injury was thereby inflicted upon the appellant. *Ball v. Cox*, 7 Ind. 453; *Barker v. State*, 48 Ind. 163; *Cunningham v. State, ex rel.*, 65 Ind. 377.

The general verdict appears to us to have been right upon the evidence. We, consequently, feel constrained to treat the error in question as only an abstract error, not affecting the substantial rights of the appellant.

Questions were reserved, and have been urged here, upon other instructions given by the circuit court, but, believing that what we have already said fairly disposes of the cause upon its merits, we deem it unnecessary to enter upon a review of any of the other instructions given at the trial.

The judgment is affirmed, with costs.

Filed Feb. 10, 1886.

McNeely *et al.* v. Holliday.

No. 12,812.

MCNEELY ET AL. v. HOLLIDAY.

MARION SUPERIOR COURT.—*Parties not Appealing to General Term can not Appeal to Supreme Court.—Dismissal of Appeal.*—Where parties, against whom judgment is rendered in the Marion Superior Court at special term, do not join in an appeal to the general term of such court, they are not parties to the judgment of the court in general term, and an appeal by them from such judgment to the Supreme Court will be dismissed.

SAME.—*When Appeal will Lie from Judgment at Special Term to Supreme Court.*—No appeal will lie from the judgment of the Marion Superior Court at special term, directly to the Supreme Court, except where some of the judges of the general term are shown to be incompetent, and then only when an appeal is perfected within one year from the rendition of the judgment. Section 1362, R. S. 1881.

SUPREME COURT.—*Bill of Exceptions.—Omission of Evidence.*—The Supreme Court will not consider or decide any question which depends for its decision on the evidence in the cause, where the bill of exceptions shows affirmatively that it does not contain all the evidence.

From the Marion Superior Court.

R. D. Logan, for appellants.

T. L. Sullivan and *A. Q. Jones*, for appellee.

HOWK, J.—It is shown by the record of this cause that, on the 18th day of October, 1884, in the court below, at special term, in an action then and there pending, the appellee, Lucy R. Holliday, as sole plaintiff, recovered a judgment and decree against Catharine D. McNeely, James H. McNeely and John H. McNeely, as defendants, for the amount due on certain notes and for the foreclosure of a mortgage on real estate given to secure such notes. It is further shown that on the same day Catharine D. McNeely alone filed a motion for a new trial, which was then and there overruled by the court, and that she alone, on the 17th day of November, 1884, appealed from the judgment at special term, and assigned errors in general term. The record further shows, that, on the 8th day of January, 1885, the judgment of the court at special term was affirmed by the court in general term.

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On the 7th day of January, 1886, on the last day of the year in which an appeal could be taken from the judgment herein of the court below in general term to this court, the defendants, Catharine D. McNeely, John H. McNeely and James H. McNeely, jointly filed a certified transcript of the record and proceedings in such suit, in the office of the clerk of the Supreme Court, as and for an appeal herein, and on such transcript they separately assigned as error that the court in general term erred in affirming the judgment of the court at special term.

It is clear, we think, that appellants James H. McNeely and John H. McNeely have no standing in this court. They did not appeal from the judgment of the court below at special term to the general term of such court; therefore they were not parties to the judgment of the court in general term, and, of course, can not prosecute an appeal from that judgment to, or in this court. They can not prosecute this appeal, as an appeal from the judgment of the court at special term, because, under section 1362, R. S. 1881, no appeal will lie from the judgment of the court at special term directly to this court, except where some of the judges of the general term are shown to be incompetent, which is not shown in this case. *Beineke v. Wurgler*, 77 Ind. 468; *Leary v. Smith*, 81 Ind. 90. Even if the case in hand were one in which an appeal might have been taken from the judgment of the court at special term directly to this court, it is clear that the pending appeal could not be maintained by appellants James H. and John H. McNeely, because, as we have seen, this appeal was not perfected by them within one year after the rendition of that judgment. As to them, therefore, this appeal must be and is dismissed, at their costs.

Catharine D. McNeely had the right, of course, to appeal from the judgment of the general term against her to this court, at any time within one year from the rendition of the judgment, and she perfected her appeal within the year. By a proper assignment of error here, she has brought before us

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the same errors of which she complained in general term. The questions discussed by her learned counsel in his brief of this cause are such only as arise under the alleged error of the trial court in overruling her motion for a new trial. The other errors assigned by her, in general term, must, therefore, be considered as waived. The only question discussed by her counsel is the alleged insufficiency of the evidence to sustain the finding of the trial court. The bill of exceptions appearing in the record shows affirmatively on its face that it does not, and never did, contain all the evidence given on the trial or hearing of this cause. It is certified by the learned judge, who heard the cause, that the evidence in the bill of exceptions, and certain other evidence attached to the bill, was all the evidence on the trial of the cause. This other evidence, which was manifestly material to the questions discussed by counsel, has become detached from the bill of exceptions in some way not accounted for, and is not to be found in the record before us. In this state of the record we must decline, as we have often held, to consider or decide any question which depends for its proper decision upon the weight or sufficiency of the evidence. *French v. State, ex rel.*, 81 Ind. 151; *Fellenzer v. Van Valzah*, 95 Ind. 128; *Collins v. Collins*, 100 Ind. 266.

Besides, upon the questions discussed by appellant's counsel, the evidence appearing in the record is conflicting, and, of course, in such a case, this court will not disturb the finding or reverse the judgment upon what might seem to be the weight of the evidence. *Cornelius v. Coughlin*, 86 Ind. 461; *Fitzgerald v. Goff*, 99 Ind. 28, and cases cited.

The judgment as to Catharine D. McNeely is affirmed, with costs.

Filed Feb. 12, 1886.

Webb et al. v. Simpson et al.

No. 12,519.

WEBB ET AL. v. SIMPSON ET AL.

APPEAL.—Time.—Decedents' Estates.—Proceeding to Set Aside Final Report of Administrator.—An appeal from the judgment in a proceeding to set aside the final report of an administrator is governed by sections 2454 and 2455, R. S. 1881, relating to decedents' estates, and must be taken within the time there provided.

From the Orange Circuit Court.

J. H. Stotsenburg and *W. Farrell*, for appellants.

J. W. Buskirk, *H. C. Duncan* and *J. F. Pittman*, for appellees.

ELLIOTT, J.—The appellants petitioned the court below to set aside a final report made by the administratrix of the estate of Mary Lane, deceased, but, upon a hearing, that court ruled against them. The judgment was rendered on the 5th day of June, 1885, but the transcript was not filed in this court until the 17th day of August. On the 11th day of October, the appellees appeared and moved to dismiss the appeal, on the ground that as the case is governed by sections 2454 and 2455, R. S. 1881, the appeal was not taken in time. This motion must be sustained. The case is not governed by the general rule regulating appeals, but is governed by the provisions of the statute referred to. *Yearley v. Sharp*, 96 Ind. 469; *Browning v. McCracken*, 97 Ind. 279; *Miller v. Carmichael*, 98 Ind. 236; *Rinehart v. Vail*, 103 Ind. 159, and authorities cited.

Whether the appellants can have an appeal granted upon a proper showing is not the question before us, and we give no opinion upon it, but confine our decision to the motion to dismiss the appeal, as that must, at all events, be sustained.

Appeal dismissed.

Filed Feb. 13, 1886.

105	327
137	536
105	327
147	615
105	327
148	378
149	459

Waymire *et al.* v. Powell *et al.*

No. 12,332.

WAYMIRE ET AL. v. POWELL ET AL.

BOARD OF COMMISSIONERS.—*Contract.*—*Allowance.*—*Voluntary Services.*—A board of county commissioners can make no contract of any kind with one of its members, and no legal allowance can be made by such board to a county commissioner for services voluntarily rendered, or things voluntarily furnished, the county by him.

SAME.—*Appeal.*—An allowance by a board of commissioners to one or more of its members for services rendered in inspecting, examining and measuring the abutments of a bridge, which had been built in pursuance of a contract theretofore made with such board, is illegal and may be appealed from by any person interested.

From the Jasper Circuit Court.

F. W. Babcock, for appellants.

S. P. Thompson, for appellees.

MITCHELL, J.—The learned counsel for appellant states the case made in this record substantially as follows: On the 20th day of February, 1884, pursuant to proper preliminary notice and proceedings, the board of commissioners of Jasper county let contracts, separately, for furnishing all materials and constructing and completing the stone abutments and superstructure for a county bridge of the value of more than \$4,000, over the Iroquois river.

On the 23d day of May, 1884, the abutments having been completed according to contract, ready for the superstructure, and the board not being in session, the appellants Waymire and Nichols, being a majority of the board of commissioners—the other commissioner living remote from the county seat—at the instance of the contractor and bridge superintendent, employed an engineer, with whom and the superintendent, they measured and estimated the abutments, and, finding them completed according to contract, received them and settled with the contractor subject to the ratification of the board in formal session.

On the 13th day of June, 1884, the board being convened

105	338
126	361

105	328
166	554

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in special session, present John Waymire, Asa C. Prevo, and Samuel R. Nichols, it was "ordered that John Waymire have an allowance of \$3.50 for *per diem* as a commissioner of this board for one day's services in inspecting, examining and measuring the stone abutments for the new iron bridge over the Iroquois river at Rensselaer, on the 23d day of May, 1884, and that the auditor draw his warrant on the county treasurer for such allowance." A like order was made at the same time in favor of Samuel R. Nichols, another member of the board.

John W. Powell, by a proper affidavit and appeal bond filed in each case, perfected an appeal to the Jasper Circuit Court. The appeals having been perfected, the cases were consolidated in the circuit court. Waymire and Nichols moved to dismiss the appeal, and the overruling of their motion to dismiss presents the principal question for decision.

It is contended here that the services, for which the allowances were made, were services voluntarily rendered, and that the allowances were, therefore, within the discretion of the board. The argument is: 1. That allowances, which a board of commissioners may make at their discretion, like other acts which are purely discretionary, are not reviewable on appeal. 2. That the allowances were for services voluntarily rendered, and, within the prohibition of section 5770, an appeal is forbidden.

The amount directly involved is inconsiderable, but the question is of importance. The proposition that any officer or officers, charged with the control and expenditure of public funds, have the power to make allowances to themselves out of such funds, either at discretion or for services voluntarily rendered, without other restraint than their own sense of fairness, is well calculated to invite attention.

The compensation of officers is, as a rule, prescribed by law, and it has often been declared by this court, that before any public officer may demand or receive compensation out of the public treasury for services performed by him, it is

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required that he show: 1. That a specific compensation is allowed by law for the services for which remuneration is claimed. 2. That express authority exists for making payment out of the public funds. *Noble v. Board, etc.*, 101 Ind. 127; *Board, etc., v. Gresham*, 101 Ind. 53; *Board, etc., v. Harman*, 101 Ind. 551; *Bynum v. Board, etc.*, 100 Ind. 90; *Wright v. Board, etc.*, 98 Ind. 88. In the case of *Board, etc., v. Gresham, supra*, this court said, in reference to the rule above stated: "It is of the highest concern to the public that this should be so; otherwise it would be within the power of one body of county officials to compensate the other county officers out of the public treasury, as a matter of grace and favor, without limit or restraint."

If county commissioners can not compensate other county officers for official services without express authority of law, it would seem necessarily to follow that they can not without such authority compensate themselves.

Section 5823, R. S. 1881, provides that "The county commissioners' fees shall be as follows: For each day's attendance as a member of the county board or board of equalization, each commissioner shall receive \$3.50."

The Legislature having, in the foregoing statute, fixed the measure of compensation for the services of a county commissioner, it is not competent for county boards to supplement the legislation thus enacted by making allowances to themselves, either at their discretion or for services voluntarily performed.

Section 5763 provides that "The boards of commissioners may make allowances at their discretion," etc., but, as was said in *Rothrock v. Carr*, 55 Ind. 334, this does "not mean an arbitrary, uncontrolled, unlimited discretion, contrary to law, or without authority of law; for where there is no law there is no act to do, and, therefore, no discretion to be exercised." The discretion therefore must be according and in subordination to the law, and not outside and in violation of it. *English v. Smock*, 34 Ind. 115 (7 Am. R. 215.)

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The order recites that the allowance was for "*per diem* as a commissioner of the board," etc., but it also shows that it was not for "attendance as a member of the county board or board of equalization," and it was therefore made without any authority of law.

Where the board of commissioners of their own motion do an act which under the law they may do or not, as in the exercise of their discretion seems best, and the time and mode of doing the act are not prescribed by law, no appeal lies from their decision in such a case. But when they make an allowance which is illegal and appears so on its face, any one aggrieved may appeal.

There are many things which are left to the discretion of county boards, in which they may act without being subject to the control of the courts in any way, but from all allowances made by such boards without authority of law an appeal lies.

It is argued, however, that even if the allowance was not proper as for official services, since the allowance was for services voluntarily rendered for the benefit of the county, and as the county had the benefit of the services, upon principles of "natural equity" the board might allow compensation, and having allowed it no appeal lies. Section 5770 provides that "No appeal shall lie from the decision of said board making allowance for services voluntarily rendered or things voluntarily furnished for the public use."

Where services have been voluntarily performed, or things voluntarily furnished for the benefit of a county without contract, which the board of commissioners might lawfully have contracted for, the board may make an allowance for services so performed or things so furnished, on the equitable principle that a county may do right when to do so is within the authority of law. *Miller v. Embree*, 88 Ind. 133.

Manifestly, this principle can not be invoked to authorize unrestrained allowances for services performed or things furnished which the commissioners, by express statute or from

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considerations of public policy, were forbidden to contract for. To permit this would be to place it in the hands of the county board to set the law at defiance with impunity. Natural equity can not grow out of a violation of the law. Doubtless, if a bridge on a public highway became out of repair and dangerous, and one with whom the commissioners might have contracted voluntarily put it in a condition of safety, the commissioners might remunerate him for the services thus rendered. Such an allowance would fall under the provisions of section 5770. As, however, the board of commissioners can make no contract of any kind with one of their own number, there can be no such thing as an allowance to a county commissioner for services voluntarily rendered or things voluntarily furnished by a member of the board.

If the services performed by the two commissioners in measuring the abutments were official services, the appellants can receive no compensation, because none is allowed by law except for attendance on the meetings of the board, etc. If they were services which they might have employed some one to perform, it was not competent for them to employ themselves. *Stropes v. Board, etc.*, 72 Ind. 42; *City of Fort Wayne v. Rosenthal*, 75 Ind. 156 (39 Am. R. 127); *McGregor v. City of Logansport*, 79 Ind. 166; *Pratt v. Luther*, 45 Ind. 250.

Where public officers are authorized by law to employ others to perform services for the municipality of which they are officers, public policy forbids that they should employ one of their own number.

It is of no consequence that no injury, or that an actual benefit, has resulted from such employment. The law will not permit public servants to place themselves in a situation where they may be tempted to do wrong, and this it accomplishes by holding all such employments, whether made directly or indirectly, utterly void. *People v. Township Board*, 11 Mich. 222; *Kinyon v. Duchene*, 21 Mich. 498.

Upon every claim that is presented for allowance, the county is entitled to the unbiased judgment of its board of commis-

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sioners. The law does not yet recognize it as a fact that members of boards of commissioners, or of any other tribunal, can sit as judges in their own cases.

The distinction between the case we are considering and *Nichols v. Howe*, 7 Ind. 506, *Board, etc.*, v. *Boyle*, 9 Ind. 296, *Sims v. Board, etc.*, 39 Ind. 40, and *Board, etc.*, v. *Richardson*, 54 Ind. 153, cited and relied on in the briefs of the learned counsel in this case and *Waymire v. Board, etc.*, *post*, p. 600, which we have examined in connection with this, is, that in the cases cited the services were performed by persons competent to contract with the county board, and were such as might have been contracted for. It was competent and in character for the commissioners to sit in judgment on the claims of others who had performed voluntary services for the county, for which a contract might have been made, but it is a matter of an entirely different complexion, when members of any tribunal present to the body of which they are a part claims in favor of themselves, and sit in judgment upon them.

It is not to be tolerated that they should be judges at all in such a case. It is certainly too much to ask that in the event the decision is in favor of themselves their judgment should be final.

The salutary rules above stated are not new; they have been declared and enforced by this court in a great number and variety of cases.

In *Wright v. Board, etc.*, 98 Ind. 88, this court said: "Unless a statute expressly, or by fair implication, makes provision for compensation, a claim can not be enforced by legal process against the county except where there is a contract stipulating for the services, and the contract is itself within the authority of the county commissioners." Substantially the same principle was stated in *Moon v. Board, etc.*, 97 Ind. 176, where it was said, in substance, that a contract for the services must be shown, and a statute authorizing compensation to be

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made, and also that the contract was within the authority of the board to make.

The foregoing cases are relevant in this, that even if there had been a contract, and a statute authorizing compensation in the case before us, as the board of commissioners had no authority to contract with themselves, the allowance would nevertheless have been illegal.

As, for the reasons already stated, the allowances made to the appellants were in every respect illegal and wholly unauthorized, the appeals were properly taken, and there was no error in overruling the motion to dismiss. It was not error, of which the appellant under the circumstances can complain, to refuse leave to amend the complaint and to dismiss the action.

We think all the facts showing the nature of the claim appeared upon the face of the record, and that the other rulings complained of were in any event immaterial and harmless. The claim was not susceptible of amendment so as to have authorized a recovery in favor of the commissioners. The whole controversy is fully presented on the motion to dismiss the appeal.

The judgment is affirmed, with costs.

Filed Feb. 10, 1886.

105	334
134	341
105	334
128	76
105	334
130	583
105	334
137	395
105	334
155	488

No. 12,869.

McMULLEN v. THE STATE, EX REL. KENDLE, DRAINAGE
COMMISSIONER.

DRAINAGE.—*Notice of Filing Petition.*—*Act of 1883.*—Under section 2 of the drainage act of 1883 (Acts 1883, p. 174), the notice to land-owners provided for therein is of the filing of the petition, and it must follow and not precede such filing.

SAME.—*Irregular Notice.*—*Assumption of Jurisdiction.*—*Judgment.*—*Collateral Attack.*—The question as to whether proper notice has been given is a

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jurisdictional one, and where there is some notice, and the circuit court acts under it as given, although it is irregular and defective, its judgment will stand as against a collateral attack.

SAME.—*Resignation of Commissioner after Reference.*—The resignation of one or more drainage commissioners, after a matter has been referred to them by name, and the appointment of their successors, will not affect the proceeding. It is not necessary to name the commissioners in the order of reference.

SAME.—*Failure to File Report at Time Fixed.—Collateral Attack.*—The failure of the drainage commissioners to file their report at the time fixed in the order of reference, without obtaining an extension of the time, is an irregularity available on appeal, but not on a collateral attack.

SAME.—*Remedy.—Appeal.—Practice.*—Where a remedy by appeal is provided, that remedy must be resorted to for the correction of all errors and irregularities.

From the Gibson Circuit Court.

C. A. Buskirk and S. H. Kidd, for appellant.

M. W. Fields and L. C. Ewing, for appellee.

ZOLLARS, J.—Appellee, as a commissioner appointed by the court to construct a drain, brought this action to collect assessments made against appellant's lands.

The drain was constructed under the act of 1881, R. S. 1881, section 4273, *et seq.*, as amended by the act of 1883, Acts 1883, p. 173. The record shows that, on the 7th day of February, 1884, the petition was filed in the clerk's office with the indorsement thereon that the petitioner fixed the 7th day of February, 1884, as the day for docketing thereof. On that day the petition was presented to the court, and the court made the following entry upon the question of notice:

"Comes now the petitioner herein, and presents to the court his petition for drainage, and said petitioner proves to the court that due and legal notice of the filing of said petition in the clerk's office of said court has been given, by posting up notices thereof in three public places in Patoka township, in Gibson county, Indiana, that being the township in which the lands described in said petition are situated, and near the line of the proposed work, in said petition set out and prayed for, and by posting a like notice at the court-

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house door, in said county, all more than twenty days before the 7th day of February, 1884, that being the day fixed upon and noted on said petition at the time of filing the same in the clerk's office of this court, as the day set for docketing of said petition in this court, and it appearing to the court that all these things have been done, it is, therefore, ordered by the court, that said petition and proceeding be placed upon the docket of this court as an action pending therein."

Three days having expired, and there being no objections interposed, the court referred the matter to the commissioners of drainage, naming them, and ordered that they should meet on the 31st day of March, 1884, make a personal inspection of the lands described in the petition, etc., and report to the court upon the first day of the succeeding May term. It is alleged in the complaint that at the May term, 1884, the commissioners not being ready to report, the matter was continued until the 23d day of February, 1885. An entry in the order-book shows a continuance, but it does not show when the continuance was ordered, nor for how long a time.

On the 23d day of February, 1885, the commissioners filed their report, assessing benefits to lands, including those of appellant. The report was signed by the commissioners of drainage. Two of them were different persons from those named in the order of reference, but they had been appointed as drainage commissioners in the place of the two who had resigned.

There having been no remonstrance filed, and more than ten days having elapsed, the report of the commissioners was approved, the drain was established, and appellant, one of the drainage commissioners, was appointed to construct the drain.

Appellant resists the payment of the assessments upon three grounds. One is, that the proceedings, which resulted in the establishment of the drain, are null and void, for the reason that there was no proper notice of the filing of the petition. It is claimed that this is apparent upon the face of

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the record, and that hence those proceedings may be successfully assailed collaterally. This contention is based upon appellant's construction of section 2 of the act of 1883, Acts 1883, p. 174. That section provides as follows: "Whenever the petitioner shall file his petition in the clerk's office of the circuit court, he shall fix and note thereon the day set for docketing thereof, and if it appear to the court that notice has been given of the filing of said petition by posting up notices thereof in three public places in each township where the lands are situated, described in said petition, and near the line of the proposed work, and at the court-house door in each of the counties in which said lands are situated, not less than twenty days before the day noted thereon, and set as the day for the docketing the same, the court shall order the same placed on the dockets of said court as an action pending therein," etc.

We think with appellant's counsel, that this section provided for giving notice of the filing of the petition, and that hence the notice should follow the filing. This is made apparent, we think, by an examination of the section, the section of which it is an amendment, and the act of 1885. The section amended, R. S. 1881, section 4275, provided that notice should be given of the *intention* to present a petition. That section did not require that the notice should name any particular day upon which the petition would be presented to the court. The form of notice provided in the act, R. S. 1881, section 4284, was, that the petition would be presented at the next term of the circuit court. There was nothing in that act requiring any day in the term to be named, upon which the petition would be presented, and there was no requirement that the petition should be filed, and thus made accessible for examination by any one, until it should be presented to the court. There was no specific mode provided for testing the sufficiency of the petition, except by remonstrance after the filing of the report by the drainage commissioners,

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and then but three days were allowed in which to file such a remonstrance. The amendment of 1883 was intended to afford better opportunities to the land-owners to contest the proceeding from the start, and hence the act provided that the petition should be filed in the clerk's office, and a definite day noted thereon when it would be presented to the court for action. Then notice was to be given, not of the *intention* to present such a petition, but of its filing. With this notice, and the petition on file, showing by the endorsement thereon the day when it was to be presented to the court for action, interested parties would be notified in advance of the exact time when the petition would go to the court, and would be afforded an opportunity to examine it, and prepare for such resistance as they might think proper.

Three days were given to such parties after the docketing of the petition in which to test its sufficiency by demurrer, etc., and to object to any or all of the drainage commissioners. This act also preserved the right to remonstrate against the report of the drainage commissioners, and extended the time to ten days after the filing of the report. The purpose of the amendatory act very plainly was to afford better opportunities to the land-owners to protect their rights than was afforded by the act of 1881, of which it was an amendment. In the way of affording still further opportunities to the land-owners, the act of 1885 (Acts 1885, p. 131, section 3) provides that the petitioner shall file his petition in the clerk's office, and note thereon the day set for docketing thereof, and give the land-owners personal notice, by written or printed notices, of the fact of the filing and pendency of such petition. This act is a good interpreter of the act of 1883. Under both of them, we think the notice should be of the filing of the petition, and hence should be subsequent to the filing.

But when we have said this much, we have not disposed of the case before us. As will be observed, it is left to the court, under the acts of 1883 and 1885, to determine whether or not proper notices have been given. The petition invoked

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the jurisdiction of the court over the subject-matter. Jurisdiction is the power to determine and act, and this power includes authority to decide erroneously as well as correctly.

The notices were required to give the court jurisdiction over the land-owners named in the petition. That such notices had been given, was a jurisdictional question which the court was required to determine before ordering the petition to be docketed. The fact that the court assumed to exercise jurisdiction, and ordered the petition to be docketed as a pending action, is proof of record that it determined that the proper notices had been given.

Where a court of superior jurisdiction exercises jurisdiction, it will be presumed that it rightfully does so, and the judgment will be invulnerable as against a collateral attack, unless the record affirmatively shows that the judgment is void. *Young v. Wells*, 97 Ind. 410.

It is contended here, however, that the record does show affirmatively that the whole proceeding, in the establishment and construction of the draft, is void, because the notices did not follow, but preceded the filing of the petition, and because the notices were not notices that the petition had been filed, but that it would be filed and presented on the 7th day of February, 1884.

The court decided that proper and sufficient notices of the filing of the petition had been posted for the required length of time, and at the proper places, and upon that adjudication ordered that the petition should be docketed. That decision was an erroneous decision, but it does not necessarily follow, because the court may have thus erred, that the whole proceeding is void, and must go down under a collateral assault. If the case were here upon appeal, it would be a different matter. The statute requires notices of the filing of the petition to be posted. Here notices were posted, but they were notices that the petition would be filed and presented, and not that it had been filed. The court decided that the notices were sufficient. This court has decided in a

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number of cases recently, that where there is any notice, no matter how irregular and defective it may be, and the court has decided such notice to be sufficient, the judgment based thereon will not be treated as void in a collateral attack by a party to the record. *Jackson v. State, etc.*, 104 Ind. 516; *Quarl v. Abbett*, 102 Ind. 233 (52 Am. R. 662); *Dowell v. Lahr*, 97 Ind. 146; *City of Terre Haute v. Beach*, 96 Ind. 143; *McCormick v. Webster*, 89 Ind. 105; *Carrico v. Tarwater*, 103 Ind. 86; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Helphenstine v. Vincennes Nat'l Bank*, 65 Ind. 581 (32 Am. R. 86).

The writer of this opinion has grave doubts as to whether or not the decisions in the above cases, and the principles upon which they rest, are applicable and controlling in the case before us. The other members of the court are of the opinion that they are, and hence we hold that the court below having decided that the notices were sufficient, appellant can not, in the collateral manner here attempted, be allowed to assail, as void, the proceedings which resulted in the establishment and construction of the drain, and the assessments against her lands.

Another ground upon which appellant claims that the assessments against her lands, and the whole proceedings are void, is, that the commissioners who made the report are not the same persons named in the order referring the matter to the drainage commissioners. As we have seen, two of the commissioners named in the order of reference resigned, and the court appointed others in their places. The persons thus appointed, in connection with the other commissioner, made the report. The court had authority to fill such vacancies by the express provisions of the statute. R. S. 1881, section 4273. The matter was referred to the commissioners of drainage. They were named in the order of reference, but we do not think that was necessary. When one or more of such commissioners resign after a matter is referred, such resignation does not stop the proceeding. When others are

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appointed to fill the vacancies, the commissioners of drainage, as a body, may go on and perform the duties in the matters referred. To hold otherwise would be to hold that upon the resignation of one or more of the commissioners, the court would have to recall all matters referred to them and go through the form of again referring them. Certain it is, that appellant's contention can not avail in the collateral attack she is making upon the proceeding.

The third and last ground upon which appellant contends that the proceedings which led to the assessments against her lands are void, is, that the drainage commissioners did not report at the May term, 1884, of the court, as they were directed to do when the matter was referred to them, and that they did not file their report until the 23d day of February, 1885. There is one entry in the record, showing that the case was continued, but there is nothing to show at what term of the court that order of continuance was made. If, as a fact, the commissioners carried the matter along without having reported to the court and procured an extension or extensions of the time in which to complete and file their report, the proceeding was radically irregular, and, in a direct proceeding upon appeal, would be so declared. But that irregularity does not render the proceedings absolutely void, as they must be, in order to overthrow them in a collateral attack, such as appellant is making. *Munson v. Blake*, 101 Ind. 78.

Appellant, as we have seen, had no actual notice of the proceedings until July, 1885. She might then have appealed and raised the questions directly, which she here seeks to raise collaterally. Perhaps other remedies by a direct proceeding were open to her, but that we need not now decide. The rule is, that where a remedy by appeal is provided, that remedy must be resorted to for the correction of all errors and irregularities. *Smith v. Hess*, 91 Ind. 424.

As the court below decided in accordance with this opinion, the judgment is affirmed, with costs.

Filed Feb. 13, 1886.

Heath v. The State.

No. 12,854.

HEATH v. THE STATE.

INTOXICATING LIQUOR.—*Purchaser of Business not Protected by License of Vendor.*—The purchaser of a saloon from one who has been licensed to sell intoxicating liquors is not protected, in conducting such business, by the license of his vendor.

SAME.—*Sale.*—*Agency.*—*Contract.*—*Evidence.*—For a contract and evidence considered and held sufficient to constitute a sale by the licensee to the person put in charge of the saloon, and not the mere creation of an agency, see the opinion.

From the Allen Circuit Court.

T. E. Ellison, for appellant.

C. M. Dawson, Prosecuting Attorney, for the State.

NIBLACK, C. J.—Upon an appeal from the judgment of a justice of the peace, the appellant, Benjamin F. Heath, was tried and convicted of selling to one Groves, on the 15th day of December, 1885, intoxicating liquor to be drunk on the premises, without a license authorizing such a sale.

The only question made upon this appeal is upon the sufficiency of the evidence to sustain the finding of the circuit court.

It was admitted by the appellant at the trial, that he sold intoxicating liquor to Groves at the time and place, and for the purpose, charged in the affidavit filed against him; that, on the 9th day of July, 1885, one Charles B. Smith obtained a license from the board of commissioners of Allen county to sell spirituous, vinous and malt liquors at the place at which the appellant sold the intoxicating liquor, for the period of one year from that date; that the building in which Smith commenced to do business under his license belonged to one Dudenhoefer, and was by him leased to Smith; that, on the 31st day of August, 1885, Smith gave to one Dennis a chattel mortgage on all the fixtures and furniture in his saloon to secure the payment of the sum of \$83.35 to be paid in one month, which time was afterwards extended for another

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month; that in October, 1885, Smith having become indebted to Dudenhoefer in the sum of \$45 for rent, the latter declared the lease to Smith forfeited; that, on the 25th day of November, 1885, Dudenhoefer commenced a suit against Smith, before a justice of the peace, to evict him from the premises, which consisted of a dwelling-house, in which the latter lived, and the saloon, and on the same day sold and conveyed the property to one Evans; that, on the 2d day of December, 1885, Dudenhoefer recovered a judgment for the possession of the property and \$10.50 in damages; that, on the 3d day of December, 1885, a writ was issued to a proper constable, commanding him to put Smith out of possession, and to collect the amount of damages and costs adjudged against him; that the constable took possession of the saloon, levied upon the fixtures and furniture in it, and, locking it up, gave the key to Dudenhoefer's attorney.

It was also made to appear by the evidence that on the next day, that is to say, on the 4th day of December, 1885, Evans, Smith and Heath came together and entered into an arrangement to have the saloon reopened and business continued in it in Smith's name. To that end Evans executed to Smith a written lease to the premises for one month, with the privilege of renewal from month to month, upon payment of the rent in advance, until the 1st day of July, 1886. Smith and Heath thereupon entered into an agreement in writing as follows:

"FORT WAYNE, IND., Dec. 4th, 1885.

"I, Charles B. Smith, of Allen county, Indiana, do hereby hire and employ Benjamin F. Heath to act as my barkeeper till the first of July, 1886, at my saloon number 401, East Wayne street, in said city of Fort Wayne. I do also authorize him to purchase such goods as may reasonably be necessary to carry on said business; and to give receipts and sign my name to such contracts as may be necessary to carry out this contract. And I do further agree to sell and deliver to him all the (fixtures) and furniture there is now in said premises

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for the sum of seventy dollars, the receipt of which is hereby acknowledged. It being agreed that said Heath shall act as such bartender, and shall procure such assistance as may be necessary, at his own expense, to properly carry out this contract. And said Heath shall faithfully carry out this contract and save said Smith from prosecutions on account of such employment; that he keep an orderly house, sell no liquors to minors, or to persons intoxicated, or to habitual drunkards, or in any manner prohibited by law. It is also agreed that said Heath shall, out of the receipts of said business, pay all bills incurred on account thereof, and that he shall have for his services all profits made in carrying on the same, and any and all liquors or goods bought by him on my account, when the same are paid for, except the sum of ten dollars per month, which is to be paid to B. B. Evans for the use of said saloon by said Heath on the account of said Smith; said Evans having this day leased the same to said Smith.

"In witness whereof said parties have hereunto set their hands the day and year above written.

"CHARLES B. SMITH.

"B. F. HEATH.

"December 4th, 1885.

"I agree that said Benjamin F. Heath shall honestly and faithfully carry out his part of the above contract.

"BENNETT B. EVANS."

Smith testified that he sold the fixtures and furniture in the saloon to Heath for \$70; that Evans furnished the money which was turned over to Dudenhoefer in payment of his rent and judgment for damages and costs; that Evans paid and took up the chattel mortgage executed to Dennis; that soon after signing the agreement with Heath, he had moved over into another part of the city and had not since been in the saloon exceeding once or twice, if at all, as to which he could not remember; that after signing the agreement, Heath got the key from Dudenhoefer's attorney and went into the possession of the saloon, assuming and continuing to be in en-

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tire control; that there was at the time probably \$10 worth of liquors in the saloon; that he, Smith, was not to get anything out of the business except \$10 which was to be paid to Evans for rent; that he considered himself the owner of the liquors in the saloon, but Heath was to have all he paid for; that he considered himself responsible for the acts of Heath while carrying on business under the contract under which he went into possession, but that he had no property which amounted to anything and was in fact entirely insolvent; that at the time he was put out of the possession of the saloon, he was in debt and had no money and could not have run the saloon any longer, and that he entered into the agreement with Heath at the request of Evans, who wanted Heath to run the saloon; that nothing was said at the time of the agreement about his transferring his license to Heath; that he did not know what liquor, if any, Heath had since bought, and that he had given himself no trouble about the business since Heath had taken charge of the saloon.

Evans and Heath also testified as witnesses in the cause, but their testimony was in general corroboration of the statements made by Smith as above, and contained nothing changing the general character of the transaction which resulted in placing Heath in possession of the saloon.

While the agreement, set out and relied upon in this case, is very similar to the one ruled upon, and held to be a valid agreement upon its face, in the case of *Runyon v. State*, 52 Ind. 320, the circumstances attending, as well as succeeding its execution, tended to prove it to have been a mere cover for the absolute sale and transfer of the saloon to Heath. In finding the defendant guilty, the circuit court evidently construed the entire transaction as amounting to an absolute sale and transfer of the saloon, and not as the mere appointment of Heath as the barkeeper and agent of Smith, and we have no reason for holding that the construction thus placed upon the evidence was an incorrect construction.

Conceding, therefore, that Heath had become the actual

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owner of the saloon, as the evidence tended to show he had, the license issued to Smith afforded him no protection for making the sale of intoxicating liquor admitted to have been made in this case. *Pickens v. State*, 20 Ind. 116; *Krant v. State*, 47 Ind. 519; *Shaw v. State*, 56 Ind. 188; *Keiser v. State*, 58 Ind. 379.

The judgment is affirmed, with costs.

Filed Feb. 16, 1886.

No. 12,100.

FRANK, ADMINISTRATOR, v. GRIMES.

SPECIAL FINDING.—*General Verdict.*—*Inconsistency.*—*Judgment non Obstante.*

—*Contract of Settlement.*—Where a complaint declares upon a written instrument, signed by the defendant, setting forth that the parties had “settled all accounts in full up to date, November 27th, 1877, and balance due” the plaintiff \$804.21, a special finding by the jury that the defendant executed the instrument, and that he had paid nothing to the plaintiff since its execution, is inconsistent with a general verdict for the defendant on a cross complaint, setting up items of account against the plaintiff which accrued prior to the date of such instrument, and judgment should go accordingly.

SAME.—*Interrogatories to Jury.*—*Submission by Court.*—*Presumption.*—*Cases*

Modified.—In the absence of any showing on the subject, when the interrogatories to the jury and their answers to them appear in the record, it will be presumed that the trial court did its duty and submitted to the jury such interrogatories, with instructions to answer the same if they found a general verdict, and the special finding will be considered. Decisions in conflict with this ruling are modified.

From the Allen Circuit Court.

A. A. Chapin and R. P. Barr, for appellant.

T. R. Marshall and W. F. McNaghy, for appellee.

Howk, J.—This suit was commenced by Henry Heist, then in full life but since deceased, against the appellee Grimes, in the Whitley Circuit Court. Heist’s complaint contained two

105	346
130	173
105	346
136	236
105	346
158	496

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paragraphs. The first paragraph counted upon a written instrument, alleged to have been executed by appellee Grimes to Henry Heist, of which the following is a copy:

"Settled all accounts in full up to date, November 27th, 1877, and balance due H. Heist \$804.21, to be paid within thirty days from date, or note given one year after date with ten per cent. interest, if he fails to do so.

(Signed) "J. GRIMES."

In the second paragraph Heist alleged that appellee was indebted to him in the sum of \$8,738.91, "for money had, and accounts paid, laid out and expended, and personal property sold and delivered, at his special instance and request," whereof a bill of particulars was filed therewith.

Appellee appeared to the action, but, before his answer was filed, on the application of Heist, the venue of the cause was changed to the DeKalb Circuit Court. In that court, before any steps were taken therein, the venue of the cause was again changed to the Allen Circuit Court. There the death of Henry Heist, testate, was suggested to the court, and the appellant, Manoah Frank, administrator with the will annexed of such decedent's estate, was substituted as plaintiff in this action. Appellee then filed his answer in six paragraphs, and, also, his cross complaint in a single paragraph. In the first paragraph of his answer appellee averred, under oath, that he did not, nor did any one thereunto by him lawfully authorized, make, execute or deliver the written instrument counted upon in the first paragraph of complaint. The second paragraph of appellee's answer was a general denial of the — paragraph of complaint. In his third paragraph of answer appellee alleged that he had fully paid and satisfied the plaintiff's entire cause of action long before the commencement of this suit. In each of the fourth, fifth and sixth paragraphs of his answer appellee pleaded special matters of set-off.

Appellant replied in two paragraphs to the special paragraphs of appellee's answer, as follows:

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1. A general denial; and, 2. Payment in full of the matters of set-off.

In his cross complaint appellee alleged that, in 1870, he entered into a contract with Henry Heist, whereby he was to sell and deliver to Heist, from time to time, all the black walnut, white walnut, poplar, ash, cherry and butternut lumber which appellee could purchase during the continuance of such agreement; that Heist agreed to pay appellee therefor certain named prices; that appellee should deliver the lumber sold to Heist at the various railroad stations, which might be most convenient for appellee, at which stations Heist agreed to inspect and receive the same and pay appellee therefor; that appellee from time to time, during 1870, 1871, 1872, 1873 and 1874, furnished Heist under such agreement a large amount of lumber, of the aggregate value of \$13,000, whereof a bill of particulars was therewith filed; that Heist paid appellee on such lumber, from time to time, various sums, amounting in the aggregate to \$7,000; that all the accounts, between Heist and appellee, remained open and unsettled, and there had never been an accounting between them; that appellee had often demanded of Heist a settlement of their transactions, but Heist had, upon various pretexts, postponed the same and refused to make any settlement with appellee; and that Heist was indebted to appellee, upon their accounts, in the sum of \$5,000, which was due and wholly unpaid. Wherefore, etc.

Issue was joined on this cross complaint by an answer in general denial.

The issues in the cause were tried by a jury, and a general verdict was returned for the appellee, the defendant below. With their general verdict the jury also returned into court their special findings on particular questions of fact, submitted to them by the appellant under the direction of the court, in substance, as follows:

“1. Did the defendant Grimes execute the instrument sued

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upon in the first paragraph of the complaint, on the 27th day of November, 1877? Ans. Yes.

"2. Has the defendant paid anything to the said Heist, or the plaintiff in this cause, since the execution of the instrument sued on in the first paragraph of the complaint? Answer. No.

"3. When did the defendant deliver to the said Henry Heist the last item of personal property which defendant sues for in his cross complaint? If you can not give the exact date give it as near as you can. Ans. The latter part of 1874, or early in 1875.

"4. Was not the defendant's cross complaint filed in this court on the 27th day of February, 1883? Ans. Yes.

"5. If not, state when it was so filed? Ans. ———.

"6. Had not all the items of account named in defendant's plea of set-off accrued prior to the 27th day of November, 1877? Ans. Yes.

"7. How much do you say there is due on the instrument named in the first paragraph of plaintiff's complaint, exclusive of any set-off? Ans. Principal, \$804.21; interest at 6 per cent., \$282.92; total \$1,087.13."

Over the appellant's motion for a judgment in his favor on the special findings of the jury, and his motion for a new trial, the court rendered judgment against him, in appellee's favor, for the sum of \$200, the damages assessed by the jury, and his costs in this suit.

In this court appellant has assigned, as errors, the following decisions of the trial court:

1. In overruling his motion for a judgment in his favor, on the special findings of the jury;
2. In overruling his motion for a new trial;
3. In rendering judgment against him, in appellee's favor, for \$200; and,
4. In rendering judgment against him, in favor of appellee.

It is first claimed in argument, by counsel for the appellant, that the trial court erred in overruling his motion for

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judgment in his favor, on the special findings of the jury, notwithstanding their general verdict. It is clear, beyond all room for doubt, that the special findings of the jury are utterly inconsistent with their general verdict, and can not be reconciled therewith. This is so, because the special findings of the jury affirmatively show that the appellee executed the written instrument, counted upon in the first paragraph of the complaint herein, on the 27th day of November, 1877, and further, that, prior to that date, all the items of account named in appellee's plea of set-off had accrued, and were, therefore, presumptively embraced in the settlement of all accounts mentioned in such instrument. It is clear, also, that these findings are in the record before us, because the statute provides that they are "to be recorded with the verdict." Section 546, R. S. 1881. Ordinarily, "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." Section 547, R. S. 1881. In construing this last provision of our civil code, it has been uniformly held by this court, that, unless the special findings of the jury are irreconcilably in conflict with the general verdict, the latter must stand, and judgment be rendered thereon, without regard to such special findings. *Detroit, etc., R. R. Co. v. Barton*, 61 Ind. 293; *Baldwin v. Shuter*, 82 Ind. 560; *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412.

The point is made, however, by appellee's counsel, that the special findings of the jury can not be considered by this court, as constituting a part of the record of this cause. Although the appellant's request to the trial court to require the jury, in case they return a general verdict, to answer his interrogatories, and the several interrogatories, and the answers thereto of the jury signed by their foreman, are copied at length in the transcript before us immediately following the general verdict, yet it is claimed by appellee's counsel, that the special findings of the jury are not properly

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in the record for our consideration, because, they say, it nowhere appears that the trial court ever submitted such interrogatories to the jury, or instructed them to answer the same, if they found a general verdict. In this position, it would seem that appellee's counsel are possibly sustained by some of our decisions, as applied to the record of this cause. *Cleveland, etc., R. W. Co. v. Bowen*, 70 Ind. 478; *Hervey v. Parry*, 82 Ind. 263; *Aiken v. Ising*, 94 Ind. 507; *Hamilton v. Shoaff*, 99 Ind. 63.

On the other hand, it is to be observed that, under our civil code, we have uniformly held that the general verdict, the special findings of the jury on particular questions of fact, the motion for judgment on such special findings notwithstanding the general verdict, the ruling of the trial court on such motion, and the exceptions to such ruling, all constitute proper parts of the record of the cause, on an appeal to this court, without any bill of exceptions or any order of the trial court. *Salander v. Lockwood*, 66 Ind. 285; *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168; *Boots v. Griffiths*, 97 Ind. 241; *Redinbo v. Fretz*, 99 Ind. 458.

In another view of the question under consideration, we are of opinion that the claim of appellee's counsel, that the special findings of the jury are not properly in the record for our consideration, is not well founded and ought not to be sustained. Doubtless, it is true that the special interrogatories must be submitted by the court to the jury, and that the court must instruct the jury, if they render a general verdict, to find specially upon the particular questions of fact, specified in such interrogatories, in their answers thereto; for these are duties which our civil code imperatively imposes upon our courts, in the trial by jury of civil causes. Section 546, R. S. 1881. It is not claimed by appellee's counsel, nor is it shown by the record, in the case in hand, that the trial court did not in fact submit the interrogatories to the jury, or did not in fact instruct the jury, if they rendered a general verdict, to find specially upon the particular

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questions of fact specified in such interrogatories. All that is claimed by counsel is, that it nowhere appears in the record that the trial court performed its plain statutory duty in relation to the submission of the interrogatories and the instruction of the jury. This claim is true, but it is equally true that the record does show that the interrogatories were answered by the jury, and their answers over the signature of their foreman were returned by them into court with their general verdict, and, as the statute requires, were "recorded with the verdict." Not only so, but the record further shows that the attention of the trial court was directed to the special findings of the jury, by appellant's motion for judgment thereon notwithstanding the general verdict. If the court had not in fact submitted the interrogatories to the jury, it is fair to assume that, upon the making of such motion, the court would have promptly struck the interrogatories and the answers thereto from the files of this cause, instead of ruling upon the motion as the record shows it did.

In this state of the record, how should we hold upon the claim made by appellee's counsel? Shall we assume, from the mere silence of the record, that the trial court did not in fact submit the interrogatories to the jury, and did not in fact instruct the jury that if they rendered a general verdict, they must answer such interrogatories? Or, are we not bound to presume, as we have often heretofore presumed in similar cases, in the absence of any showing to the contrary, that the trial court performed its plain statutory duty in relation to such interrogatories? In this court, as we have often declared, the presumption is that the trial court has not erred in any of its rulings or proceedings, and this presumption is indulged, until it clearly and affirmatively appears from the record of the cause that error has been committed.

In the *fifth* clause of section 533, R. S. 1881, which is substantially a re-enactment of section 324 of the civil code of 1852 (2 R. S. 1876, p. 167), it is provided that "When the

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argument of the cause is concluded, the court shall give general instructions to the jury," etc. Under this statutory provision we have often held, in cases where the records were silent on the subject, that we must presume the trial court had performed its statutory duty by giving "general instructions to the jury." Thus, in *Stott v. Smith*, 70 Ind. 298, the court said: "Where, as in the case at bar, the contrary is not shown by the record, we are bound to assume that the court discharged its plain statutory duty, and at the proper time gave the jury such 'general instructions.' These general instructions of the court are not in the record. In their absence, if it were conceded that the special instructions asked by the appellant stated the law correctly, and were applicable to the case, we would be bound to conclude that the court had refused to give the jury such special instructions, for the reason that their legal substance had been already given, in the court's own language, in its 'general instructions.'" To the same effect, substantially, are the following cases: *Fitzgerald v. Jerolaman*, 10 Ind. 338; *Freeze v. DePuy*, 57 Ind. 188; *Myers v. Murphy*, 60 Ind. 282; *Bowen v. Pollard*, 71 Ind. 177; *Morris v. Stern*, 80 Ind. 227; *Holmes v. State*, 88 Ind. 145; *Town of Princeton v. Gieske*, 93 Ind. 102.

It will hardly do to hold, as it seems to us, that, in the absence of any showing to the contrary, we are bound to presume that the trial court performed its statutory duty in giving general instructions to the jury, but can not presume that the court did its duty in instructing the jury, that, if they render a general verdict, they must answer the interrogatories, as required by section 546, *supra*. We are of the opinion that the same presumption must be indulged in the latter as in the former case, that the court did its duty in giving the jury the instructions required by law, whenever the record is silent on the subject. Our conclusion is, therefore, that the special findings of the jury are properly in the record for our consideration, and that the error of the court, in overruling

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appellant's motion for judgment on the special findings of the jury, notwithstanding their general verdict, is so saved in and presented by the record of this cause that it must be considered.

From what we have already said in relation to the utter inconsistency between the special findings of the jury and their general verdict, it follows of necessity, we think, that the trial court erred in overruling appellant's motion for judgment on the former, notwithstanding the latter. Our code provides, and our decisions uniformly hold, that where, as in this case, there is such an inconsistency as can not possibly be reconciled between the special findings of the jury and their general verdict, the former shall control the latter, and the court shall give judgment accordingly. Section 547, R. S. 1881; *Thompson v. Cincinnati, etc., R. R. Co.*, 54 Ind. 197; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88, and cases cited.

It may seem that what we have said in this opinion, in relation to the submission of interrogatories to the jury, is in conflict with some of the previous decisions of this court, and, perhaps, this is true, but to the extent of any such conflict, it must be held that such previous decisions are modified by this opinion. Our conclusion upon the error already considered, of course, renders it unnecessary for us to consider now any of the questions arising under the other errors assigned by the appellant.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain appellant's motion and to render judgment in his favor on the special findings of the jury, notwithstanding their general verdict.

Filed Jan. 22, 1886; petition for a rehearing overruled April 24, 1886.

Clift *et al.* v. Nay.

No. 12,351.

CLIFT ET AL. v. NAY.

VENDOR AND PURCHASER.—Rights of Third Persons.—Notice to Purchaser.—Inquiry.—Mortgage.—Satisfaction by Mistake.—Where a mortgagee, by mistake and without consideration, has actually entered satisfaction of the mortgage on the margin of the record, notice given by him to a subsequent purchaser of the land from the mortgagor, who still owes a part of the purchase-money, that he has a claim on the land, and that the entry of satisfaction is a forgery, is sufficient to put such purchaser on inquiry, and further payment to his vendor is at his peril.

From the Henry Circuit Court.

D. W. Chambers, J. S. Hedges and L. P. Mitchell, for appellants.

W. Grose, for appellee.

MITCHELL, J.—All that is material to present the question for decision is the following statement, summarized from the facts as specially found by the court:

On the 13th day of May, 1878, Thomas B. Reeder owed Elias Nay \$300, part of the purchase-price of a tract of land in Henry county. The debt was originally contracted to Nay and Elliott. It was secured by Reeder's note, and a duly recorded mortgage on the land for part of the purchase-price of which it was given. Elliott, prior to the date above mentioned, assigned his interest in the debt to Nay. On the date above mentioned, Nay and Elliott by mistake entered and signed on the margin of the record a formal release and satisfaction of the mortgage. This entry was duly attested by Reeder who was at the time county recorder. The release was made by mistake, without any consideration, under the impression that they were satisfying another mortgage. The note was not paid or satisfied, but both it and the mortgage were held as evidence of a subsisting debt by Nay. Afterward, on the 24th day of May, 1881, Reeder sold and conveyed the land mortgaged to the appellant Clift for the consideration of \$2,500. Clift purchased in good faith, under

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the belief that the mortgage debt was paid, relying on an abstract shown him by Reeder, which indicated that the mortgage was released and satisfied. Without any notice to the contrary, he paid all the purchase-money except \$200. Before that was paid, Nay notified him of his mortgage on the land. Clift replied that Reeder had furnished him with an abstract, and in response Nay informed Clift that the release of his mortgage which appeared on the record was a forgery.

As a conclusion of law the court stated that the \$200 of the purchase-price remaining unpaid, together with interest from the date of the notice by Nay to Clift, was a lien on the land by virtue of the mortgage satisfied as above stated. A decree was given accordingly. The conclusions of law were excepted to by Clift.

The only ground upon which a reversal is sought is, that the special finding of the court does not show notice of Nay's mortgage to the appellant before he paid the \$200; that the finding amounts to nothing more than evidence tending to show notice.

We think the finding is more than evidence of notice. The finding of the court on that subject is as follows: "That afterward, on the — day of June, 1881, and before he had paid the residue of the purchase-money in suit, he was notified by the said Nay that he had and held a claim upon said property, to which he replied that Reeder had furnished him a complete abstract, in response to which he was informed by the said Nay that the satisfaction of said mortgage on the record was a forgery."

It is contended in argument, that because the court found that the release was not a forgery, but had been made through mistake, therefore Clift had a right to disregard what he was told, and rely on the genuineness of the signatures to the release. We do not think this follows. The purchaser was notified by Nay that he held a claim on the land, and that the release of the mortgage which appeared on the record was a forgery. This was enough to put the appellant on in-

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quiry. He could not thereafter pay the unpaid purchase-money to Reeder and depend upon a mere technical inaccuracy of expression employed by the appellee. Doubtless, if further inquiry had been made, the truth would have been fully ascertained. Having been notified of the appellee's claim, and that the release and satisfaction of the mortgage as shown by the record was not recognized as genuine, if the appellant chose to pay without further inquiry he did so at his own peril.

Satisfaction having been entered by mistake and without consideration, it was not operative between the parties, or in favor of a subsequent purchaser with notice. A purchaser who receives notice of the rights of another, before full payment, is not a good faith purchaser without notice, to the extent that the purchase-price remains unpaid. *Burton v. Reagan*, 75 Ind. 77, and authorities cited; *Anderson v. Hubble*, 93 Ind. 570 (47 Am. R. 394).

The judgment is affirmed, with costs.

Filed Feb. 13, 1886.

No. 12,305.

SNODDY v. LEAVITT.

ESTOPPEL.—*Married Woman.*—*Joining in Deed to Husband's Land.*—*Assertion by Her of After-Acquired Title.*—*Warranty.*—A wife, who joined her husband in the execution of a warranty deed conveying his land, at a time when she was not liable upon covenants of warranty, is not estopped from asserting a title to such land which she subsequently acquires in her own right.

TAXES.—*Payment by One in Possession Under Legal Title.*—*Lien.*—*Mortgage.*—For taxes paid by him while in possession under the legal title a person can not enforce a lien upon the real estate as against one who obtains title thereto through the foreclosure of a mortgage already existing thereon.

From the Clay Circuit Court.

G. A. Knight and C. H. Knight, for appellant.

E. S. Holliday and G. A. Byrd, for appellee.

106	357
183	140
106	357
136	496
106	357
140	178

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ZOLLARS, J.—Appellee brought this action to have the title to certain lots described in her complaint quieted in her.

The following is a fair summary of the facts as established by the evidence: In 1873 William Leavitt, appellee's husband, purchased and received a warranty deed for a tract of land adjoining the city of Brazil, and, appellee joining, executed a mortgage to his grantor to secure about \$5,000 of the unpaid purchase-money. Subsequent to this, Leavitt platted and laid off the lots as an addition to the city of Brazil. On the 1st day of June, 1874, William Leavitt and appellee, as his wife, joining, conveyed the lots in dispute by a warranty deed to one McClelland. In November, 1874, the notes secured by the mortgage not having been paid, an action was commenced to foreclose the purchase-money mortgage, to which action McClelland was one of the parties defendants. In June, 1875, the mortgage was foreclosed, and all the property covered by it was ordered sold to make the amount of two of the notes described in the mortgage. In December, 1875, the other note secured by the mortgage was assigned to John Leavitt, a brother-in-law of appellee. In May, 1876, McClelland, his wife joining, by a warranty deed, conveyed the lots in dispute to appellant. In February, 1877, appellant purchased the same lots at a tax sale for the amount of the taxes assessed for the year 1875 and former years, and returned as delinquent in the name of McClelland. Subsequently he paid the taxes for the years 1877, 1878 and 1879. On the 3d day of December, 1878, John Leavitt commenced an action to foreclose the purchase-money mortgage for the amount of the note which he owned by assignment from the mortgagee, as aforesaid. To this action appellant and his wife, with others, were parties defendants, and made default. On the 13th day of October, 1879, a decree was rendered foreclosing the mortgage, and ordering a sale of all the land covered by it, including the lots in dispute. No sale was ever made upon this decree. During the pendency of this action, viz., on the 21st day of December, 1878, the sheriff sold all

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of the land and lots under the first decree, and said John Leavitt became the purchaser, and received a sheriff's deed therefor on the 29th day of December, 1879. In November, 1881, John Leavitt, by warranty deed, conveyed to appellee all of the land and lots covered by the purchase-money mortgage, and which he had purchased at the sheriff's sale, with the exception of certain named lots. The deed covered the lots in dispute. In February, 1882, appellant received from the county auditor a tax deed for the lots in dispute, and purchased by him at tax sale as above stated.

Upon these facts the court below rendered a decree quieting the title to the lots in dispute in appellee as against any claim of title by appellant through the conveyances to him, and as against any claim of a lien for the amount of taxes paid by him.

To reverse this judgment appellant prosecutes this appeal. One of his contentions is, that, appellee having joined with her husband in a warranty deed conveying the lots to McClelland, she is estopped from asserting an after-acquired title as against the grantees, and that the title she acquired by her deed from John Leavitt inures to the benefit of her grantee, McClelland, and through him to the benefit of appellant. This contention is based upon the cases of *King v. Rea*, 56 Ind. 1, and *Beal v. Beal*, 79 Ind. 280, and the reasoning upon which those cases are made to rest. The case of *King v. Rea*, *supra*, which was followed in *Beal v. Beal*, *supra*, rests upon the doctrine of equitable estoppel.

The key to the case is given in the following extract from the opinion: "The statute which enables her thus to convey, during coverture, the lands held in her own right, imposes upon her, as a corollary, all the obligations of the conveyance, save those which the statute itself excepts—for it would be an absurdity to say that she had passed her lands if she could take them back again; and the estoppel does not depend upon the obligation of the covenant of warranty, although the books sometimes loosely say so; it depends on good faith,

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right conscience, fair dealing and sound justice. When a person, competent to act, has solemnly made a deed, he shall not be allowed to gainsay it to the injury of those whom he has misled thereby." Again: "And we think it may be held, as settled law in this State, that a married woman may be estopped by matter *in pais* from setting up title to lands. *Scranton v. Stewart*, 52 Ind. 68, and authorities there cited. If so, we do not clearly perceive why she should not be estopped by her deed." It was accordingly held that when a married woman joins with her husband in a conveyance of lands held in her own right, which purports to convey the entire estate therein, she is estopped from afterwards setting up any title to the lands so conveyed, whether it existed at the time of making the conveyance or was subsequently acquired.

It may well be said that some of the reasoning upon which the case rests, has been shaken and overthrown by the subsequent cases, holding that prior to the statute of 1881, R. S. 1881, section 5117, a married woman was not bound by an estoppel *in pais*, especially when such an estoppel was invoked to affect her right or title to real estate. See *Levering v. Shockey*, 100 Ind. 558; *Wilhite v. Hamrick*, 92 Ind. 594; *Buchanan v. Hubbard*, 96 Ind. 1; *Applegate v. Conner*, 93 Ind. 185; *Parks v. Barrowman*, 83 Ind. 561; *Brandenburg v. Seigfried*, 75 Ind. 568; *Suman v. Springate*, 67 Ind. 115; *Unfried v. Heberer*, 63 Ind. 67; *Behler v. Weyburn*, 59 Ind. 143; *Miller v. Albertson*, 73 Ind. 343. However this may be, upon the main question decided, the case has been cited and followed, and has become the settled law of the State. *Beal v. Beal*, *supra*; *Youst v. Hayes*, 90 Ind. 413.

We think it very clear, however, that neither the doctrine of the case and those following it, nor the reasoning upon which it rests, is applicable and controlling here. The real estate, in the conveyance of which appellee joined, was not her separate property; hence she was not the real vendor, and did not receive the consideration therefor. Indeed, she

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was not a vendor at all in any full legal sense. The land belonged to the husband. She had no present title to any portion of it. Her right was an inchoate right simply. When, by the death of the husband or the sale of the land at judicial sale, her inchoate right might ripen into a present right, it would, under our statute, be greater than a dower right, yet, until the happening of one of these events, her right was no more a present right than in case of a right of dower. She had nothing that she could convey separate and apart from the right and title of the husband. She could join with him in a conveyance, but her deed really conveyed nothing in the way of title, because she had no present interest to pass by deed. Her joinder in the deed operated, not as a conveyance, but as a release of her inchoate right. The whole title was in the husband. His deed, without the wife joining therein, would have carried the whole and the perfect legal title. If the husband make a deed of his lands, that deed carries the perfect legal title, and hence the joinder of the wife therein is of no consequence at all, unless she survives the husband. Her joinder in the deed is a release of her right to claim one-third of the land in case she survives the husband, and nothing more. So our cases hold, and so the authorities are elsewhere.

With the death of the husband, the wife's inchoate right becomes a present right, and hence she may convey it, and so, if the husband's real estate be sold at judicial sale, under the act of 1875, the wife's inchoate right becomes a present right, and she may sell or mortgage it, her husband joining in the deed or mortgage. *Hudson v. Evans*, 81 Ind. 596; *McCormick v. Hunter*, 50 Ind. 186; *Hancock v. Fleming*, 85 Ind. 571 (576); *Dunn v. Tousey*, 80 Ind. 288; *Youst v. Hayes*, *supra*.

By joining in the husband's deed of his real estate, and thus releasing her inchoate right simply, it can not be said that the wife put herself in a position where the reasoning in the case of *King v. Rea*, *supra*, should be applied to her. She

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conveyed nothing, received nothing, and did nothing which should estop her from asserting an after-acquired title in her own name, and acquired by her own means, she at that time not being liable upon a covenant of warranty.

In the case of *Gonzales v. Hukil*, 49 Ala. 260, it was held that the joint conveyance of land by the husband and wife, as his property, does not estop the wife from setting up a title subsequently acquired; that she is not *sui juris*, except to relinquish her dower.

In *Blain v. Harrison*, 11 Ill. 384, it was held, as stated in the syllabus, that a wife who joins her husband in a deed is not a party to the deed except for the purpose of releasing her dower in the estate conveyed, and is not thereby estopped from setting up a subsequent title.

If the rule contended for by appellant should be applied to appellee, surely she ought not to be estopped, except as to the interest she had in the land conveyed. It would be inequitable to impose upon her an estoppel that would prevent her from acquiring and asserting an interest in the lands which she had not conveyed, nor attempted to convey. That would be to make the wrongs of the husband work as an estoppel against the wife. He sold the land and received the pay for it, and hence it is easy to see why he should be estopped from asserting against his grantee an after-acquired title; but, clearly, the estoppel ought not to be broader than the grant. As we have seen, a married woman was not liable upon covenants of warranty at the time the deed by appellee's husband and herself was executed to McClelland.

A husband is liable upon the covenant of warranty, where he joins the wife in a deed of her real estate, and he is thus liable as upon a contract that he is competent to make. If in such a case his liability were to be measured by the doctrine of estoppel alone, we know of no reason why his liability should extend beyond the interest he had in the land conveyed.

Appellee was not liable upon the covenant of warranty,

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nor was she estopped from acquiring and asserting title to the land under the facts of this case. The court below in so holding held correctly.

But one question remains. Appellant does not claim that he acquired any title through the tax sale and tax deed, but his contention is that he should have a lien upon the real estate for the amount of the taxes by him paid. We think otherwise. As between appellee and himself, he was simply paying his own taxes. The legal title was in him, and he was in possession of the real estate. See, as somewhat analogous, the case of *Cooper v. Jackson*, 99 Ind. 566.

Judgment affirmed, with costs.

Filed Feb. 17, 1886.

No. 12,673.

WILLIS v. BAYLES.

HABEAS CORPUS.—Motion to Quash Writ.—Sufficiency of Complaint.—Practice.

—In *habeas corpus* proceedings a motion to quash the writ tests the sufficiency of the complaint or application on which it is issued.

SAME.—Statutory Requirements.—Where the complaint in a *habeas corpus* proceeding complies substantially with the requirements of the statute (section 1108, R. S. 1881), it is sufficient to withstand a motion to quash the writ.

SAME.—Imprisonment Under Judgment.—Judgment Must be Void to Entitle Discharge.—The writ of *habeas corpus* can not be used for the correction of mere errors in the judgment under which the petitioner is restrained of his liberty. To entitle him to a discharge from custody he must show, either by his petition or proof, that the judgment is void.

SAME.—Justice of the Peace.—Execution Against Body.—Jurisdiction.—Erroneous Judgment.—Collateral Attack.—Where, under sections 1559 and 1560, R. S. 1881, providing for *ca. sa.*, a justice of the peace has jurisdiction of the subject-matter and of the parties, his judgment, upon a defective verdict, however erroneous, is not void, and can not be collaterally attacked by a party thereto in a *habeas corpus* proceeding.

105	363
127	470
105	363
132	249
105	363
136	107
135	363
148	385
105	363
154	113
155	413
105	363
157	89
157	90
157	176
157	212
105	363
163	407
105	363
164	402

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STATUTES.— *Restraint of Personal Liberty.*— *Construction.*— Statutes which may operate in restraint of personal liberty must be strictly construed.

From the Sullivan Circuit Court.

S. C. Coulson, J. C. Briggs and W. C. Hultz, for appellant.

J. W. Shelton, J. S. Bays and W. S. Maple, for appellee.

HOWK, J.—In this case, the appellee Bayles filed his verified complaint in the court below, alleging that he was unlawfully restrained of his liberty and held in custody by the appellant Willis, sheriff of Sullivan county, and praying for the issue of a writ of *habeas corpus* in his behalf. The writ was accordingly issued and delivered to the appellant, who made return thereof in writing, and produced in court the body of the appellee. Written exceptions were filed by appellee to appellant's return, which were sustained by the court, and, upon appellant's failure to amend his return, the court ordered and adjudged that appellee be discharged from his custody.

Appellant has assigned errors here which call in question the decisions of the circuit court (1) in overruling his motion to quash the writ, (2) in sustaining appellee's exception to his return or answer, and (3) in discharging the appellee from custody.

In *habeas corpus* proceedings, a motion to quash the writ tests the sufficiency of the complaint or application whereon the writ was issued. *McGlennan v. Margowski*, 90 Ind. 150; *Milligan v. State, ex rel.*, 97 Ind. 355.

In his verified complaint, appellee alleged that he was a citizen of this State, residing in the town and county of Sullivan; that he was unlawfully restrained of his liberty and held in custody by appellant, the sheriff of such county, in the county jail; that the cause and pretence of his restraint, according to his best information and belief, was a certain pretended commitment or execution against appellee's body, commanding his arrest and imprisonment, issued by one Jacob N. Land, a justice of the peace of Haddon township, in Sul-

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livan county, upon a certain affidavit filed before one Owen Davis, a justice of the peace of Hamilton township in such county, for a *capias ad satisfaciendum*, by one John W. McCoskey; that such cause and pretence was wholly untrue, and such restraint was illegal, in this, to wit:

First. That there was no judgment against appellee upon which an execution against his body could be legally issued.

Second. That the justice of the peace, Jacob N. Lamb, had no authority to issue such commitment or execution against the body of appellee.

Third. That the writ upon which appellee was arrested was wholly illegal and void.

All of which facts were true, as appellee was informed and believed. Wherefore, etc.

It is claimed by appellant's counsel that appellee's verified complaint did not state facts sufficient to entitle him to the issue of the writ of *habeas corpus*. Section 1108, R. S. 1881, declares that such a complaint "shall specify—

"*First.* By whom the person in whose behalf the writ is applied for is restrained of his liberty; and the place where; naming all the parties if they are known, or describing them if they are not known.

"*Second.* The cause or pretence of the restraint, according to the best of the knowledge and belief of the applicant.

"*Third.* If the restraint be alleged to be illegal, in what the illegality consists."

Appellee's complaint in this case, the substance of which we have given, complies substantially with these statutory requirements. The facts stated therein made a *prima facie* case in his favor, which authorized the issue of a writ of *habeas corpus* as prayed for, and were abundantly sufficient, we think, to withstand appellant's motion to quash the writ. *Milligan v. State, ex rel., supra*; *Ex Parte Lawler*, 28 Ind. 241; *Flora v. Sachs*, 64 Ind. 155. The motion to quash the writ was correctly overruled.

The next error complained of in argument, on behalf of

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appellant, is the sustaining of the exceptions to his return or answer to the writ of *habeas corpus* issued in this cause. In his return or answer the appellant said that, on the 3d day of September, 1885, one John W. McCoskey obtained a judgment against appellee for \$122.70 and costs of suit, which judgment was duly rendered by and before Owen Davis, a justice of the peace of Sullivan county, duly and lawfully authorized in that behalf to try and determine, in an action wherein McCoskey was plaintiff and appellee was defendant, which judgment was still in full force, unpaid and not appealed from; that after the rendition of such judgment, appellee having failed and refused to pay or stay the same, McCoskey duly and legally instituted proceedings for a *capias ad satisfaciendum* against appellee, before Owen Davis as such justice, charging appellee with fraudulently concealing, withholding, transferring and secreting certain property, moneys, rights, credits and choses in action, subject to execution, with intent to cheat, defraud and delay him, McCoskey, in the collection of such judgment debt; that appellee appeared on the 3d day of September, 1885, in answer to such proceeding, and moved the justice to change the venue of the proceeding from Hamilton township, where the proceeding was then pending, and filed an affidavit in support of such motion; that, upon such application, the venue of such proceeding was changed to Haddon township, in such county, and the cause was sent to Jacob N. Land, a justice of the peace in such township; that, on the 6th day of October, 1885, the appellee and McCoskey each appeared, in person and by counsel, at the hour set for trial, before justice Land, who had competent authority to try and determine the cause; that, by agreement of the parties, the cause was tried by a jury of eleven good and true men, who were duly sworn to try the same and a true verdict render therein, according to law and the evidence; that said cause having been then and there submitted to such court and jury, and the evidence having been heard and the arguments of counsel made, and

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such jury being fully advised, and having retired to their room to deliberate of their verdict, "and their minds and understandings being enlightened," they afterwards, on said day, returned into such court their verdict and finding for the plaintiff, McCoskey, against the defendant, Bayles, "that said Bayles fraudulently withheld, concealed, transferred and removed the sum of \$150 in money, belonging to him, the said Bayles, with intent to defraud and delay said judgment creditor, John W. McCoskey;" that thereupon such justice then and there rendered judgment upon such verdict in said cause according to law, said Bayles having then and there refused and failed to pay over and surrender such money, or any part thereof, for the benefit of said plaintiff, or to pay such judgment; that thereupon such justice then and there issued on such judgment an execution against the body of John N. Bayles, setting out a copy of such execution, and then and there delivered the same to Andrew J. Latshaw, a constable in and for such township of Haddon, then and there duly qualified and acting as such; that such constable, by virtue of such execution, did, on the 19th day of October, 1885, arrest said Bayles in the town and county of Sullivan, and delivered him, said Bayles, into the custody and keeping of appellant, who was the sheriff of Sullivan county, duly and legally authorized in that behalf, and, as such sheriff, had control and charge of the jail of such county and the custody of the prisoners therein confined from time to time; that appellant had John N. Bayles in his custody, under the proceedings aforesaid and in the manner aforesaid; and that, so far as appellant was informed, the officers aforesaid were legally authorized and acting as such, and all proceedings set out or referred to, in his return, were regular and authorized by law, and the restraint of John N. Bayles by appellant was authorized by law. Wherefore, etc.

Appellee excepted in writing to the sufficiency of appellant's return, upon the ground that it did not state facts sufficient to justify the appellant in holding appellee in cus-

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tody and in restraining him of his liberty. As we have already said, the court sustained appellee's exceptions and discharged him from appellant's custody.

We learn from the briefs of counsel, as well of the appellee as of the appellant, that appellee's written exceptions were sustained by the court to appellant's return to the writ of *habeas corpus*, and that appellee was discharged from appellant's custody upon the ground that the justice's judgment, awarding execution against the body of the appellee, in favor of John W. McCoskey, was upon its face absolutely null and void, and not merely erroneous. Of course, if the justice's judgment was null and void, the decision of the trial court in sustaining appellee's exceptions to appellant's return, and in discharging appellee from the custody of appellant, was clearly right and must be affirmed. But if, on the other hand, appellant's return to the writ does not affirmatively show that the justice's judgment, awarding execution against the appellee's body, was absolutely void, then it must be held that the trial court erred in sustaining appellee's exceptions to such return and in discharging him from appellant's custody, however erroneous the justice's judgment may appear to have been, and the judgment of the court below in the case in hand must be reversed.

It is settled law that the writ of *habeas corpus* can not be used as a writ for the correction of mere errors in the judgment, under and by force of which the petitioner for the writ is restrained of his liberty. "An imprisonment under a judgment," said Chief Justice MARSHALL, "can not be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." *Ex Parte Watkins*, 3 Pet. 193. In such case the petitioner for the writ assails collaterally the judgment under which he is imprisoned, and it is clear that to entitle himself to a discharge from such imprisonment he must show the judgment, either by his petition or by his proof on the hearing, to be an absolute nullity.

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In the case under consideration, the appellee admitted by his demurrer to appellant's return to the writ, as the cause is now presented, that the justice's judgment, under which he was restrained of his liberty, was fully and correctly described in such return. The fundamental question for our decision in this case, therefore, may be thus stated: Do the facts stated in appellant's return to the writ show that the justice's judgment, under which appellee was restrained of his liberty, was or is null and void? The proceedings had and judgment rendered by and before Justice Land, of Haddon township, awarding the issue of a *capias ad satisfaciendum*, on a judgment theretofore rendered by Justice Davis, of Hamilton township, in favor of John W. McCoskey and against appellee, were manifestly intended to be had and rendered under and in conformity with the provisions of sections 1559 and 1560, R. S. 1881, in force since May 6th, 1853. So far as applicable to the case of *McCoskey v. Bayles*, it is provided in section 1559 as follows:

"The creditor wishing such execution, his agent or attorney, shall file with the justice an affidavit, charging the debtor * * * * that he has moneys, rights, credits, or effects, with which the judgment of such creditor, or some part thereof, might be paid, and which he fraudulently withholds or conceals with a view to delay or defraud his creditor."

Section 1560 provides as follows: "Such affidavit need not designate specifically any property, moneys, or effects fraudulently removed, transferred, concealed, or withheld by such debtor; but the justice or jury, in determining the matters in issue between the parties, if the finding be for the creditor, shall designate in such finding the moneys, effects, property, or things in action which have been thus removed, concealed, transferred, or withheld, and also the value thereof."

Other sections follow, providing for the issue and service of process, the proceedings upon default or upon issue and trial, and if the finding or verdict be against the debtor, and he

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fail or refuse to comply therewith, for the issue of an execution against his body, for his arrest thereunder, and for his commitment to, and confinement in, the county prison "until duly discharged according to law." But these other sections need not be further noticed in this opinion.

No question is made here by the counsel of either party, and we express no opinion, upon the change of venue asked for and granted in the proceeding instituted by McCoskey to obtain an execution against appellee's body. The first point made by appellee's counsel, in defending the decision of the trial court in sustaining the exceptions to appellant's return to the writ, and discharging appellee from custody, is, that the sections of the statute, above quoted, are in restraint of personal liberty, and must therefore be strictly construed. Doubtless this is the recognized rule for the construction of statutory provisions which may operate in restraint of personal liberty; and we agree with counsel that, under this rule, the provisions quoted should receive a strict construction. *Ramsey v. Foy*, 10 Ind. 493.

It is claimed by appellee's counsel that the verdict of the jury, in the proceeding before the justice to obtain an execution against the appellee's body, was not in compliance with the provisions, strictly construed, of section 1560, above quoted, and hence did not authorize the justice's judgment awarding the issue of such an execution. Conceding, without deciding, that the verdict of the jury in such proceeding did not conform to the requirements of section 1560, above quoted, strictly construed, it does not follow by any means that the justice's judgment thereon, awarding an execution against appellee's body, was an absolute nullity. The utmost that can be said against such judgment is that it was error to render it upon the verdict of the jury. The justice had full and complete jurisdiction, under the statute, of the subject-matter of such proceeding and of the persons of the parties, appellee as well as plaintiff McCoskey. In such a case, however strictly the statutory provisions above quoted may be

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construed, and however erroneous thereunder may have been the verdict of the jury and the justice's judgment, it is certain that, under our decisions, such judgment was not a nullity and can not be collaterally attacked by a party thereto in a *habeas corpus* proceeding.

In Church on Habeas Corpus, section 372, it is said: "Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issuance of the writ; and it is well settled by both the State and Federal courts that a judgment or sentence can not be assailed on *habeas corpus*, if it is merely erroneous, the court having given a wrong judgment when it had jurisdiction of the person and subject-matter." So this court has held in several recent cases. *State, ex rel., v. Murdock*, 86 Ind. 124; *Smelzer v. Lockhart*, 97 Ind. 315; *Smith v. Hess*, 91 Ind. 424; *Farmer v. Lewis*, 92 Ind. 444 (47 Am. R. 153); *Lowery v. Howard*, 103 Ind. 440.

We are of opinion, therefore, that the trial court erred in the case now before us, in sustaining the exceptions to the return to the writ and in discharging appellee from appellant's custody.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the exceptions to the return to the writ, and for further proceedings not inconsistent with this opinion.

Filed Feb. 17, 1886.

No. 12,088.

HOFFMAN v. BUTLER.

PROMISSORY NOTE.—*Principal and Surety.*—*Accommodation Endorser.*—*Subrogation.*—One who becomes accommodation endorser for two joint makers of a promissory note at the request of one only of such makers, upon being compelled to pay, is subrogated to the rights of the original cred-

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itor, and may maintain an action against the other maker, both presumptively standing to him as principals.

SAME.—Delivery.—Implied Authority of One Joint Maker to Procure Endorser.

—A promissory note is not a complete instrument until delivery, and the possession of it by one joint maker impliedly authorizes him to secure an additional endorser.

From the Perry Circuit Court.

H. J. May, for appellant.

S. K. Connor and *W. Henning*, for appellee.

ELLIOTT, J.—The appellant, Wendell Hoffman, and Thomas A. Clark, were sureties on a bond executed by Aaron Blackford to the Remington Sewing Machine Company; the principal in the bond violated its condition and his sureties became liable to the obligee. The debt due the latter was compromised and a note was executed for the sum agreed to be paid; this note was signed by Clark and Hoffman, and was endorsed by John Marto and the appellee, James M. Butler. Suit was brought on the note and judgment obtained. One-half of the amount of the debt evidenced by the note was paid by Butler and one-half by the other endorser, John Marto. Clark testified that he and Hoffman were the original debtors, and that they were the principals in the note. In the course of his examination as a witness, Clark was asked: "Was Wendell Hoffman surety for you in any of these things?" and he answered: "He was not, he and I were principals on the note and Butler and Marto were sureties."

Butler testified, among other things, as follows: "I signed the note as surety for Clark and Hoffman; signed it on the back at Clark's plow factory; he asked me to sign it; Hoffman never asked me to sign the note; Mr. Hoffman never expressly nor impliedly requested me to sign the note as surety for him; I regard Hoffman as a principal in the note."

This evidence very satisfactorily shows that no part of the original consideration was received by Butler, but that it enured entirely to the benefit of the joint makers of the note.

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The position occupied by Butler is, therefore, that of an accommodation endorser for two joint makers, who appeared upon the face of the note to be primarily bound for the debt evidenced by it. He did not undertake to endorse the note for the accommodation of one of the joint makers, but for both, and, as the note had not been delivered, it must be held, in the absence of countervailing evidence, that both of the joint makers stood to him substantially as principals. 2 Daniel Neg. Inst. 1332*a*; Baylies Sureties, 470, 475. The note was not a completed instrument until delivery, and the possession of it by one joint maker impliedly authorized him to secure another endorser before completing it by delivery. This is just and equitable, and does the appellant no harm, for it can make no difference to him whether he pays the amount of the note to the original creditor or to the person who endorsed it for accommodation without receiving any consideration. The makers are liable to pay the note, for they received the consideration, and it would be unjust to cast that burden upon one who had received no benefit. We are clear that the appellee has a right to recover the amount paid by him, and to be subrogated to the rights of the original creditor.

Appellant relies upon a general statement contained in section 180 of Brandt on Suretyship and Guaranty, but this general statement will be found on examination not to apply to such a case as the present. The single case cited by that author contains this language: "The counsel for the plaintiff assimilates the case to that of an endorser on a bill of exchange or promissory note, who has paid all and taken up the paper, or who has paid part: he may maintain assumpsit for money paid to the use of the acceptor of the bill or drawer of the note. *Pownall v. Ferrand*, 12 Engl. C. L. 230. The answer to this argument is, that the endorser of a bill or note is considered in law a surety. A bill is an undertaking by the acceptor, and a note by the drawer, to pay the sum named at all events; and each subsequent party by his endorsement,

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undertakes to pay it upon default of any prior party. Hence by the nature of these instruments, each subsequent party is a surety for every prior one." *Carter v. Black*, 4 Dev. & Bat. 425. It thus appears that when we get to the foundation of the authority relied upon by the appellant, it is flatly and strongly against him.

Judgment affirmed.

Filed Feb. 16, 1886.

No. 12,153.

COX v. RATCLIFFE.

PRACTICE.—*Evidence.*—*Answers to Interrogatories.*—*Judgment.*—In determining a motion for judgment on special findings notwithstanding the general verdict, the evidence, whether documentary or otherwise, can not be considered.

SAME.—Unless it affirmatively appear that the facts specially found are irreconcilably in conflict with the general verdict, the latter must control.

REAL ESTATE.—*Ejectment.*—*Defence.*—*Equitable Mortgage.*—Where one holding a deed absolute on its face sues to recover possession of the land therein described, the person in possession may defeat a recovery by proof that the deed was taken as security for money loaned to, or advanced as a loan for, the person in possession. The real nature of the transaction may be inquired into, and what purports to be an absolute deed, whether made by the party claiming the equitable right, or pursuant to a judicial proceeding, or otherwise, may be shown to be in legal effect only a mortgage.

SAME.—*Sheriff's Sale.*—*Agreement by Purchaser to Extend Time for Redemption.*—*Statute of Frauds.*—An agreement made during the year for redemption by the purchaser at sheriff's sale, or his assignee, by which the time for redemption is extended, is valid, and will prevent such purchaser or assignee from acquiring title made under such sale. Such a contract is not affected by the statute of frauds.

SAME.—*Evidence.*—In an action for possession of real estate, where the plaintiff claims an absolute legal title under a deed, it is proper to admit evidence showing that the plaintiff has another action pending to foreclose the defendant's equity of redemption in the same land, thereby treating such deed as a mortgage, and this, notwithstanding the fact

106	374
130	499
106	374
132	284
133	159
106	374
155	602
106	374
158	323
158	664

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that the foreclosure suit was originally joined with the suit in ejectment, and the causes of action subsequently separated.

From the Howard Circuit Court.

J. N. Sims and *F. Cooper*, for appellant.

J. W. Kern, B. F. Harness, J. C. Blackledge and *W. E. Blackledge*, for appellee.

MITCHELL, J.—Timothy B. Cox brought suit against Andrew Ratcliffe, to recover possession of eighty acres of land in Howard county, which is described as the west half of the southwest quarter of section thirty-four, township twenty-three north, of range two east.

Issues having been joined on the complaint by an answer in general denial, a jury returned a general verdict for the defendant. With their general verdict the jury returned answers to fourteen interrogatories submitted to them at the request of the plaintiff.

In answer to the interrogatories the jury found specially the following facts:

1. On January 31st, 1877, the sheriff of Howard county executed a deed for the north half of the land in controversy to Lewis O. Lloyd.

2. This deed was made in pursuance of a sale made one year before its date on an execution against the defendant.

3. The execution was duly issued on a valid judgment of the Howard Circuit Court against Ratcliffe.

4. The land was never redeemed from the sheriff's sale.

5. The defendant never acquired any other title to the land.

6. Lloyd and wife conveyed the title thus acquired to the plaintiff December 21st, 1877.

7. Defendant and his wife, about the same date, made a quitclaim deed for the same land to plaintiff.

8. DeWitt C. Bryant also recovered judgment against the defendant in the Howard Circuit Court at its March term, 1876.

9. An execution was issued on this judgment.

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10. The south half of the land in controversy was sold to satisfy this last execution.

11. The land levied on was purchased at this sale by Bryant, who afterwards transferred his certificate of purchase to the plaintiff, to whom the sheriff made a deed after the period for redemption expired.

12. There was a mutual agreement between the plaintiff and defendant, before or at the time of the delivery of the respective deeds, that if the defendant would repay to plaintiff the money he had paid out and expended, with interest, he would reconvey the land to him.

13. There was no specified time within which this agreement was to be performed by the defendant.

14. The defendant never paid any consideration for the extension of the time for redemption of the land bought by Lloyd.

The plaintiff moved the court for judgment in his favor on the special findings, "and the documentary evidence in the cause," notwithstanding the general verdict. This motion was overruled, and judgment was given for the defendant on the verdict returned.

The plaintiff asserted and still asserts an absolute title to the land. This claim is supported by the various deeds mentioned in the special finding. Upon the face of the deeds an apparently absolute title is vested in him. Conceding the plaintiff's apparent title, the defence proceeded upon the theory, that in consequence of a contemporaneous agreement, the deeds constituted nothing more than an equitable mortgage to secure the repayment of moneys advanced by the plaintiff for the defendant's use; that the plaintiff agreed before the time for redemption expired, to take the title and extend the time for redemption. In the light of these conflicting theories, the influence of the facts specially found upon the general verdict may be considered.

If we correctly apprehend the position of appellant's counsel, their contention is that, because it appears from the spe-

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cial findings that the plaintiff was vested with a complete legal title to the land in controversy, he was also entitled to the possession, and that, therefore, it was error to refuse to sustain his motion for judgment on the special findings. The argument seeks to maintain the proposition that any parole agreement which might have been made, to the effect that the plaintiff should take and hold the title as a security, was void as within the statute of frauds.

The evidence, whether documentary or otherwise, can not be looked to in determining a motion for judgment on the special findings notwithstanding the general verdict. *Pennsylvania Co. v. Smith*, 98 Ind. 42.

The general verdict was for the defendant, and the rule is so well settled that the citation of authorities is not necessary, that unless it affirmatively appears that the facts specially found are irreconcilably in conflict with it, the general verdict must control.

While the facts specially found establish an apparently absolute title in the plaintiff, this would not of itself overthrow the general verdict, for the reason that the defendant may have been lawfully entitled to the possession notwithstanding the plaintiff's legal title.

If it were required, when facts are found which, in one aspect of the case, are inconsistent with the general verdict, that the special findings should make it affirmatively appear that the general verdict was, in all other respects, sustained, there would be force in the appellant's contention; but the rule is the reverse. The special findings must present such a state of facts as that the general verdict is completely overthrown by the facts found.

Against the facts found which show a legal title in the plaintiff, stands, first, the general verdict for the defendant, and, second, the facts specially found, from which it appears that at or before the delivery of the several deeds to the plaintiff it was agreed that if the moneys paid out and expended

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by him were refunded, with interest, the land should be re-conveyed to the defendant.

It is settled by the decisions of this court that where one holding a deed absolute on its face sues to recover possession of the land therein described, the person in possession may defeat a recovery by proof that the deed was taken as a security for money loaned to, or advanced as a loan for the benefit of, the person in possession. *Beatty v. Brummett*, 94 Ind. 76, and cases cited; *Heath v. Williams*, 30 Ind. 495; *Parker v. Hubble*, 75 Ind. 580; *Creighton v. Hoppis*, 99 Ind. 369; *Smith v. Parks*, 22 Ind. 59; *Crane v. Buchanan*, 29 Ind. 570, and cases cited; *Murray v. Walker*, 31 N. Y. 399; *Ryan v. Dox*, 34 N. Y. 307; *Stoddard v. Whiting*, 46 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251.

The real nature of the transaction may be inquired into, and what purports on its face to be an absolute deed, whether made by the party claiming the equitable right, or pursuant to a judicial proceeding, or otherwise, may be shown to be in legal effect only a mortgage.

A court of equity will have regard to the real nature of the transaction, and although a deed be absolute in form, if in fact it was received as a security for the repayment of money, it will be treated as a mortgage, and evidence, written or oral, will be received to show the facts.

While it is true, as contended, that the holder of the legal title has *prima facie* the right to possession, this right, as we have seen, may be defeated by the person in possession, if upon the evidence he can make it appear that as to him the deed is a mortgage. *Parker v. Hubble*, *supra*.

It is settled, too, that an agreement made during the year for redemption, by which the time for redemption is extended, is valid, and will prevent the purchaser at sheriff's sale from acquiring title under such sale. Such a contract is not void within the statute of frauds, and if the purchaser was thereby thrown off his guard, and in reliance thereon failed to redeem, the contract will be enforced even though no money was paid

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to secure such extension. *Butt v. Butt*, 91 Ind. 305 ; *Rector v. Shirk*, 92 Ind. 31 ; *McMakin v. Schenck*, 98 Ind. 264.

No error was committed in overruling the motion for judgment notwithstanding the general verdict.

There is abundant evidence in this case upon which the jury could have found that an agreement had been made between Lloyd and the appellee before the year for redemption expired, that the time for redemption should be extended, and that the appellant knew of that fact at the time he received the conveyance from Lloyd.

The appellee paid Lloyd forty dollars of the amount due him on the debt after the land was sold, and the appellant paid the balance, and both Lloyd and the appellee testified that the deed was made upon an agreement with the appellant that he was to have time to repay the amount.

Without detailing the evidence further, we think the verdict is sustained as to the whole tract.

A significant circumstance in this case is, that the appellee remained in possession and made lasting and valuable improvements on the land. Another circumstance of weight also is the fact, properly admitted in evidence, that at the time the plaintiff below was prosecuting this suit for possession, there was also pending another action to foreclose the defendant's equity of redemption, thus treating the deeds in the one case as mortgages, while in the other he was insisting upon the right to recover possession under them.

It is true, the foreclosure suit was, at the beginning, the second paragraph of the complaint in the present case. The actions were separated upon the order of the court, but the pleading declaring upon the deeds as mortgages was nevertheless properly admitted in evidence. *Boots v. Canine*, 94 Ind. 408.

It is insisted that the appellant had the right to state his cause of action in different ways in separate paragraphs of his complaint, and that it was error to admit one paragraph in evidence to defeat the other. We doubt the right to unite

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causes of action so inconsistent, involving the same transaction, but, however that may be, the evidence was properly admitted.

All the other points which are properly presented by the record, and discussed by counsel, are covered by what has already been said.

The case of *Shubert v. Stanley*, 52 Ind. 46, relied on by the appellant, is not applicable here. As the facts make it appear, this is the case of a mortgagor in possession. Under the statute and the decisions already referred to, he has the right to remain in possession as against the mortgagee, until his equity of redemption is foreclosed and sold, and the purchaser's right to possession matures in the regular course.

We have discovered no error in the record. The judgment is accordingly affirmed, with costs.

Filed Feb. 16, 1886.

105	380
124	342
105	380
143	491
105	380
161	390

No. 12,306.

LOCKWOOD v. FERGUSON.

DRAINAGE.—*Surveyor's Certificate to Contractor.*—*Must be Collected as Other Taxes.*—*Personal Action Against Owner will not Lie.*—An action will not lie against the owner of land, whether a resident or non-resident, for the recovery of the amount of a certificate executed by the county surveyor to a contractor for the construction of a section of ditch, pursuant to section 4305, R. S. 1881, or for the enforcement of the lien thereby given; but it is the duty of such surveyor to file a copy of the certificate with the county auditor, to be charged and collected as other taxes.

From the DeKalb Circuit Court.

W. L. Penfield and *H. J. Shafer*, for appellant.

J. E. Rose, for appellee.

Howk, J.—The controlling question in this case arises under the alleged error of the circuit court in overruling appellant's demurrer to appellee's complaint.

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In his complaint appellee Ferguson declared upon a written certificate executed to him, as alleged, by the surveyor of DeKalb county, of which the following is a copy:

"AUBURN, IND., Nov. 1st, 1884.

"This certifies that I, the undersigned, surveyor of DeKalb county, Indiana, have examined the allotment of Alonzo Lockwood, on the James Carnahan drain, from stake 56.50 to stake 75, and find the same fully completed, according to specifications of said ditch. Amount due John D. Ferguson, for the performance of the above ditch, \$366.80.

"(Signed) J. JAY VANAUKEN, Surveyor."

It is shown by the averments of the complaint, that this certificate was executed to the appellee Ferguson under and pursuant to the provisions of section 4305, R. S. 1881, in force since September 19th, 1881; and such other facts were stated by appellee as would have constituted a good cause of action, if a personal action could be maintained, in any case, upon such a certificate. The first point made by appellant's counsel, in discussing the alleged insufficiency of appellee's complaint, is, that a personal action can not be maintained by the contractor for the recovery of the money due him under the surveyor's certificate. Appellant's counsel insist that appellee has mistaken his remedy, and that he can only secure the collection of the money due him, under such certificate, by procuring the county auditor to charge the amount thereof on the tax duplicate against appellant's land, to be collected as other taxes are collected.

On the other hand, appellee's counsel vigorously insists, that section 4305 provides for two classes of cases, where the share or allotment has been sold to a person not the owner of the land assessed therefor, as follows: 1. Where the owner of the land assessed is a resident of the county; and 2. Where the owner of the land assessed is a non-resident of the county. As to the first class, it is claimed by appellee's counsel, that the statute makes the sum specified in the surveyor's certificate, "due and payable immediately by the

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owner of the land," and provides that "such certificate, if not paid on demand, shall draw interest until paid." As to the second class, appellee's counsel claims that the statute make it the duty of the county surveyor, only as to that class, to file a copy of his certificate with the county auditor to be entered by him on the tax duplicate, and collected as other taxes are collected, together with six per cent. after the same became delinquent. Finally, it is claimed on behalf of appellee, that as appellant was a resident of DeKalb county, and as the statute made the amount mentioned in the surveyor's certificate the personal debt of the appellant to the appellee, due and payable immediately, the appellee can maintain a personal action against the appellant for the recovery of such personal debt.

These questions were considered by this court in the recent case of *Storms v. Stevens*, 104 Ind. 46, and it was there held substantially that an action would not lie against the owner of the land, whether a resident or non-resident, for the recovery of the sum expressed in the certificate, executed by the county surveyor to the contractor for the construction of a section of a ditch, pursuant to the provisions of section 4305, or for the enforcement of the lien thereby given. It was further held to be the duty of the county surveyor to file copies of his certificates, executed as aforesaid, with the county auditor, whether the land-owners were resident or non-resident, and the duty of the county auditor to charge the sum expressed in any such certificate on the tax duplicate against the proper land-owner, to be collected as other taxes are collected. Upon the authority of the case cited, it must be held in the case in hand that the appellee can not maintain his action, and that it was error to overrule the demurrer to his complaint.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the complaint.

Filed Feb. 13, 1886.

Campbell v. Maher.

No. 12,093.

CAMPBELL v. MAHER.

ARGUMENT OF COUNSEL.—*Comments on Change of Venue.*—*Misconduct Justifying Reversal of Judgment.*—Repeated comments of counsel for the defendant, in argument to the jury, sanctioned by a ruling of the trial court, on the fact that the plaintiff had taken a change of venue, is such misconduct as will justify a reversal, unless it appears that no harm resulted.

SAME.—The argument of counsel to the jury must be confined to the law and the evidence.

From the Pike Circuit Court.

G. G. Reily and W. C. Niblack, for appellant.

ELLIOTT, J.—In the course of his argument to the jury the counsel for the appellee said: "The record in this case shows that the plaintiff was not willing to try this case at his home in Daviess county, among his neighbors, but has brought the case to Pike county on a change of venue, among strangers." The appellant objected, and the court, as the record recites, "remarked that it was not improper for counsel to refer to matters which were disclosed by the record, since the whole record was before the jury, but that the argument of counsel had gone too far, and should be limited to the record." What followed is thus exhibited in the record: "And thereupon counsel for the plaintiff resumed his seat, and the counsel for the defendant again turned to the jury, and, resuming his argument, said: 'The court says I may refer to the record. Gentlemen, the record of this case shows that the cause was brought from Daviess county to this county on the motion of the plaintiff.' To which statement the plaintiff's counsel again objected, and again assigned in support of his objection the reasons assigned by him in support of the objection to argument of defendant's counsel herein above set out, but the court overruled said objection, to which the plaintiff's counsel excepted, whereupon the defendant's counsel again turned to the jury and said: 'Gentlemen of the jury, I have only stated to you what the record in this cause shows

105	383
127	407
105	383
134	344
105	383
137	353
105	383
160	440

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to be true, and the court has decided that I have a right to do this.'"

The trial court was unquestionably wrong in ruling that everything that appears in the record is the subject of argument to the jury, for there are many things which the record discloses that the jury have no right to consider. Juries, as every one knows, are sworn to try the case "according to the law and the evidence," and an argument must be confined to the evidence and the law. Where a party secures a legal right according to law, the fact that he has secured it can not be used to his prejudice. A change of venue is a legal right, and where it is awarded by the court in conformity to law, it can not be used to the prejudice of the party by whom it was obtained, nor can it be commented on in argument. It would be a perversion of law to permit the exercise of a legal right, under the order of the court, to be made the subject of consideration by a jury. We need not, however, discuss this question further, for it is settled against the appellee by authority. *Farman v. Lauman*, 73 Ind. 568.

The comments of counsel were not mere general, fugitive statements, but they were reiterated, and they were also sanctioned by the ruling of the court, so that there was a deliberate and emphatic presentation of an improper subject to the jury, and unless we can ascertain from the record that no harm resulted, we must reverse. The record does not enable us to declare that the appellant was not injured, for the case is a close one upon the evidence, and we can not say that the misconduct of the appellee's counsel did the appellee no injury. There are cases where a reversal will not be adjudged, although there is some misconduct in argument. *Shular v. State*, ante, p. 289, and authorities cited; "Misconduct of Counsel in Argument," 14 Cent. L. J. 406. This is not such a case.

Judgment reversed.

Filed Feb. 17, 1886.

Brown v. The State.

No. 12,852.

BROWN v. THE STATE.

CRIMINAL LAW.—Instructions.—Harmless Error.—Verbal inaccuracies in instructions, or technical errors in the statement of merely abstract propositions of law, are not available for the reversal of the judgment, where they result in no substantial harm to the defendant, and where, taking the instructions as a whole, the jury are correctly charged in respect to the law applicable to the facts in the case.

SAME.—Reasonable Doubt.—An instruction on the subject of reasonable doubt, that in order to justify an acquittal, the doubt must “arise out of the evidence in the case,” and be such as to cause a prudent man to hesitate “in the gravest and most important affairs of life,” is erroneous. The evidence must be such as to produce in the minds of prudent men such certainty that they would act upon the conviction produced without hesitation in their own most important affairs.

SAME.—Indictment.—Murder.—Mortal Wounds Inflicted by Different Instruments.—Jury Need not Determine Which Caused Death.—Where the infliction by the accused upon the deceased of two mortal wounds with different instruments, resulting in death, is charged in separate counts of an indictment, the jury may find the defendant guilty as charged in both counts, without determining which wound was the immediate cause of the death..

SAME.—Evidence.—Threats.—Upon the trial for murder of one who has killed a rival suitor, evidence of a general threat made by the defendant to kill any one whose attentions should be received by the object of his jealous regard, is admissible.

From the Madison Circuit Court.

M. S. Robinson and *J. W. Lovett*, for appellant.

D. W. Wood, Prosecuting Attorney, *W. R. Pierse* and *C. B. Gerard*, for the State.

MITCHELL, J.—At the June term, 1885, the grand jury of Madison county, by a formal indictment in two counts, made presentment to the circuit court, that, on the 24th day of April, 1885, Luther F. Brown had feloniously and with premeditated malice murdered Eli F. Cummins.

In the first count, it was charged that the mortal wound had been inflicted with a knife. In the second, the charge was that the killing was by the use of a stone.

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128	196
106	386
133	690
106	386
136	287
105	385
145	20
105	385
148	700
148	704
149	406
149	407
106	386
155	270

Brown v. The State.

The accused, having pleaded not guilty, was tried by a jury. He was found guilty as charged, of murder in the first degree, and his punishment fixed at imprisonment for life. Over a motion for a new trial, judgment was rendered upon the verdict.

To reverse this judgment the record is brought here on appeal, with an assignment that the court erred in overruling the motion for a new trial. The evidence is voluminous and is set out in the record.

It appears that the deceased and the accused were young men residing in the same neighborhood. Some time prior to the homicide, the accused had been accustomed to call upon and was in apparent favor with a Miss Ayleshire, the daughter of a neighboring farmer. At the time of the homicide, and for some months before, the deceased had seemingly obtained the greater favor with the young lady, and the visits of the accused had from some cause been discontinued. The evidence tends to show that some ill feeling had been engendered between the two young men. On the night of April 24th, 1885, the young lady had invited some of her friends to an entertainment at her father's house. The deceased was present, with others, by her invitation. The accused came, as he asserts, upon the invitation of the deceased. Both were members of a string band, and the claim of the accused is, that he was invited to be present to assist in furnishing music for the occasion. For some reason his presence was distasteful to Miss Ayleshire, and she so intimated to him soon after his arrival. Upon this intimation he quietly withdrew from the house, but remained in the yard between the house and barn in company with a half brother. There is evidence tending to show that while he and his relative were in the yard, probably an hour after he withdrew from the house, word was brought to the father of the young lady that the accused was making threats of violence against the deceased. The evidence, on behalf of the State, tends to show that Mr. Ayleshire thereupon went out and admonished him to leave

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his premises and go home, saying to him that there must be no disturbance at his house, and that that was no place to settle disputes.

The testimony of the accused is to the effect that Mr. Ayleshire invited him back into the house. Soon after this interview, in some manner not fully disclosed in the evidence, the deceased and accused met at or near the door of Mr. Ayleshire's house. An altercation and scuffle of brief duration ensued. The accused was overmatched, and with his relative again retired from the scene to a shed or barn near by and adjacent to a path or highway leading from the house.

Here he remained until the fatal encounter occurred.

The State's evidence tends to support its claim, that the purpose of the accused, in going to and remaining under the shed by the public highway, was to lie in wait for and intercept the deceased, so as to re-engage him in the contest or controversy on his way home.

The claim of the defence is, that the purpose was to take shelter from a slight rain storm which came on, and prevailed a part of the time during which he remained there, and to wait for friends, who were going his way home. Before going to the shed, and after the first altercation, the accused, upon the pretext that he wished to use it about his work the next day, borrowed a pocket-knife of his relative, which he kept in his possession while he remained under the shed. The entertainment progressed, without interruption, until about 12 o'clock, when the guests separated to go to their respective homes. The way of the deceased lay by the shed under which the accused had for some purpose taken shelter. Others passed the same way slightly in advance of the deceased. When opposite, or a short distance beyond the shed, the evidence tends to show that the deceased was accosted by the accused with a reference to the cause of the previous altercation, which involved a question of veracity between them. Angry words ensued. Epithets were exchanged. A fight was proposed. The deceased put down his violin and the box in which it

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was contained, and went a short distance in the direction of the accused, then turning away, with the statement that he would "not fight any man who fought with a knife," took up his box and violin and started on his way homeward.

There was evidence tending to show that after proceeding about fifteen feet, the deceased turned his head partially round to look in the direction of the accused, when he was struck on the forehead, about one inch above the left eyebrow, with a missile thrown by the accused. He was seen to stagger and throw his hands up to his head, going in the direction of the barn. The accused met him, and, as the witnesses describe, the two "clinched" and "struggled" with each other. The deceased threw the accused, and seemed to try to stamp upon him, without success. The accused got up and they "clinched" and "struggled" again, when both seemed to fall, the accused on top. Thus the contest ended.

Discovering that the deceased was seriously hurt, and unable to walk, the bystanders carried him back to the house from which he had departed a few minutes before, where he died in two or three minutes afterwards. The accused sustained no injury to speak of. Six wounds were found upon the person of the deceased, two of which were mortal. One was produced by a blow on the forehead with a missile which fractured the skull, another with a knife which penetrated his left side or breast, in the vicinity of the heart.

The accused admits in his testimony that he threw at and hit the deceased with a stone, and that he cut him with a knife. That he killed him is not disputed. The claim is that it was done in self-defence. It is argued that at most the offence did not rise to either degree of murder.

Without entering upon a discussion of the evidence, of which the foregoing statement presents only very briefly an outline of some of the most salient points, we can not concur in the view so elaborately presented. An examination of the evidence has led to the conviction that it not only tends to support the verdict, but that a verdict of murder in one or

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the other degree must have resulted, unless every account of the fatal tragedy, and the circumstances which led up to it, except that given by the defendant himself, was discredited and disbelieved; indeed, the defendant's statement shows but little in mitigation of the crime.

The jury may well have believed that the accused went unbidden where the deceased was an invited guest; that his threats brought on the first collision, after he had been courteously admonished to depart; that, smarting under temporary discomfiture, he armed himself with deadly weapons—a knife and stone—and lay in wait for hours for the purpose of renewing the conflict with his antagonist, and that he struck the first deadly blow after the deceased declined a conflict and was retreating to avoid further encounter with a “man who fought with a knife.”

That the deceased, after receiving a mortal wound at the hands of his assailant, may have “staggered” towards and grappled with him, in no way mitigates the infliction of other wounds with the knife, one of which was surely and speedily fatal. We can not disturb a verdict supported by evidence such as that exhibited in this record, nor do we think it necessary to enter upon a critical examination of the law of self-defence. Upon the defendant's own statement there is no room for the application of any of the principles governing the defence of one's person.

The instructions given by the court to the jury are made the subject of general criticism. Some of them are specifically assailed in the argument. Some of the objections relate to mere inaccuracies of expression, as, for example, in the first instruction, the court inadvertently told the jury that the first count of the indictment alleged the killing to have been done with a stone, and the second with a knife, whereas, in fact, the first charged that the fatal wound was inflicted with a knife, and the second with a stone. So, in the second instruction, the jury were told that “the defendant is presumed to be innocent of all the *crimes* charged in the indictment,”

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etc. The verbal inaccuracies may be admitted, but that any prejudice to the defendant could have resulted on that account can not be seriously maintained.

In the third instruction the court undertook to define what constituted a reasonable doubt. The jury were told, in substance, that it was not their duty to go beyond the evidence in search of doubts, based on merely groundless conjectures; that in order to justify an acquittal the doubt should be reasonable, and arise out of an impartial consideration of the evidence in the case, and that it must be such a doubt as would cause a prudent and considerate man to hesitate before acting in the gravest and most important affairs of life; that if upon a careful and impartial consideration of all the evidence, the jury had an abiding conviction of the defendant's guilt, then they were satisfied beyond a reasonable doubt.

We can not commend this instruction. It is not an accurate statement of the law upon the subject of reasonable doubt. To the extent that the instruction was liable to be understood as saying to the jury that in order to justify an acquittal, the doubt of the defendant's guilt must arise out of the evidence and be such as to cause a prudent man to hesitate before acting in matters of the gravest concern, it was clearly wrong. It is not the law that in order to justify an acquittal the doubt must arise out of the evidence given, and be such as to cause a prudent man to hesitate. The doubt may arise from a want of evidence. In order to justify a conviction the evidence must be such as to produce in the minds of prudent men such certainty that they would act upon the conviction produced without hesitation in their own most important affairs. *Jarrell v. State*, 58 Ind. 293; *Stout v. State*, 90 Ind. 1. The instruction is subject to criticism in other particulars.

There are other instructions in the record, of which it might be said they are not technically accurate as abstract statements of the law. Upon an examination of all the instructions, however, as applied to the evidence in the case, we are of opinion that no substantial injustice resulted to the de-

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fendant. The principal facts in the case were not seriously in dispute, nor could there have been any grave doubt upon any point material to a conviction.

A careful consideration of all the evidence leaves no room for doubt in our minds, that, notwithstanding the court may have in some degree erred in the statement of merely abstract propositions of law, the jury were, taking the instructions as a whole, correctly charged in respect to the law applicable to the facts in the case. The conclusion was inevitable, upon any justifiable theory of the evidence, that the jury must have found the defendant guilty of murder in one or the other degree.

The statute wisely provides in respect to appeals in criminal cases, that, "In the consideration of the questions which are present, upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant." R. S. 1881, sec. 1891.

Considering all the instructions given, it appears that the jury were, in respect to all that was material to enable them to arrive at a correct result, properly instructed. However much we may regret the giving of instructions which are subject to criticism, we can not, in view of the statute, reverse the judgment for the errors which may have intervened, on account of inaccuracies or merely abstract misstatements of law found in some of the instructions. *Epps v. State*, 102 Ind. 539.

On behalf of the defendant, ten instructions were presented and refused by the court. The first was to the effect, that unless the jury were convinced beyond a reasonable doubt, that the death of the deceased was immediately caused by a blow upon the head, and that the blow was inflicted by the defendant, they must acquit, so far as the second count was concerned. This instruction was properly refused.

There was no dispute but that the blow on the head was

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inflicted by the defendant. The evidence tended to show that two of the wounds found upon the body of the deceased were probably, and almost certainly, mortal. It was not material that the jury should have been convinced beyond a reasonable doubt which particular wound was the immediate cause of the death.

If they found that two mortal wounds were inflicted by the defendant, as charged in the several counts of the indictment, and that death resulted therefrom, they were authorized to find the defendant guilty as charged in both counts, without determining which wound was the immediate cause of the death.

Most of the instructions asked related to the subject of self-defence. It may be said, they are, as abstract statement of law, correct. We are, however, unable to discover any evidence in the record which makes the law of self-defence applicable to any extent. Besides, the law relating to the right of self-defence was stated to the jury in a substantially accurate instruction given by the court.

The only other ruling complained of relates to a decision of the court in admitting certain evidence offered by the State.

As already stated, some ill feeling seems to have been engendered in respect to the relations of the deceased and the accused with Miss Ayleshire. The defendant had been her suitor. He had been supplanted by the deceased. This lady, having been called as a witness for the State, the following question was propounded to her: "I will ask you to state what, if anything, Mr. Brown ever said to you about killing anybody that ever went to see you?" Over the defendant's objection she was permitted to answer, as follows: "I never heard him make any threats against any particular one. He said he would kill any one if I received their company, but him."

This evidence was clearly admissible for what it was worth. If true, it tended to show that the killing was premeditated; that it was the execution of a purpose to destroy the life of

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any one who might be preferred in the esteem of the witness to himself. As exhibited by the record, the inspiring motive which impelled the defendant in the bloody tragedy seems to have been a feeling of base and uncontrolled jealousy.

We think the verdict was right on the evidence, and notwithstanding the technical misstatements of the law already alluded to, it so clearly appears that these were not influential in producing a result which must have been reached in any event, that no substantial injury was done.

The judgment is affirmed, with costs.

Filed March 30, 1886. Petition for a rehearing overruled May 15, 1886.

No. 12,001.

SUNIER v. MILLER, AUDITOR.

DRAINAGE.—Notice.—Appearance.—Waiver.—Joining in Remonstrance.—The joining in a remonstrance against the establishment of a ditch and the levying of assessments, is an appearance which waives notice.

SAME.—Injunction.—Where there has been no objection to the notice, its validity can not be questioned collaterally in a proceeding for an injunction.

SAME.—Assessments not Reviewable in Suit for Injunction.—A land-owner can not by a suit for an injunction have a review of the assessment of benefits and damages in a ditch proceeding. Such questions must be litigated before the board of commissioners, where the proceeding originated, or on appeal.

SAME.—Proceedings Must be Void to Authorize Injunction.—An injunction will lie where the proceedings are void, but not where they are merely erroneous or irregular.

SAME.—Appeal from Board of Commissioners.—Power of Circuit Court to Remand.—Upon appeal from a decision of the board of commissioners, in a drainage proceeding, the circuit court has authority, after a hearing, when it deems it proper, to remand the case to the board for further action.

SAME.—An order of the circuit court annulling the assessments, because they are erroneous, and remanding the case for that reason, vacates only that part of the proceeding.

From the Wells Circuit Court.

106	393
124	410
106	393
134	550
105	393
144	275
105	393
152	95
105	393
155	440
105	393
158	163
158	209
105	393
171	11

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A. N. Martin, H. L. Martin, J. S. Dailey, L. Mock and — Simmons, for appellant.

E. R. Wilson, J. J. Todd and A. Duglay, for appellee.

ELLIOTT, J.—This suit was brought by the appellant to enjoin the auditor of Wells county from enforcing an assessment levied for the purpose of constructing a ditch, or, more accurately speaking, from enforcing an order establishing a ditch, under the act of April 21st, 1881, made by the board of commissioners.

The appellant argues that the proceedings are void because no notice was given as the law requires. We agree with counsel that the general rule is, that notice is required in all such proceedings as the present. *Hobbs v. Board, etc.*, 103 Ind. 575; *Wright v. Wilson*, 95 Ind. 408. We do not doubt that notice is a fundamental matter, and if not given the proceedings are void, unless the complainant has, in some effective method, waived it. *Strosser v. City of Fort Wayne*, 100 Ind. 443. But while the general rule is that stated, it is as well settled as the rule itself that where the party voluntarily appears the fact that there was no notice to him does not render the proceedings void. Notice may be waived, and it always is waived where there is an appearance. There is, as is well known, a broad distinction between jurisdiction of the person and jurisdiction of the subject-matter; consent may confer the former, but not the latter. This rule applies to proceedings of this character. *Boston, etc., Railroad v. Folsom*, 46 N. H. 64; *Copeland v. Packard*, 16 Pick. 217; *Muire v. Falconer*, 10 Grat. 12; *East Saginaw R. R. Co. v. Benham*, 28 Mich. 459; *People v. Burton*, 65 N. Y. 452.

The appellant joined in a remonstrance against the establishment of the ditch and the levying of the assessments, and this was an appearance. We can perceive no reason for holding that one who joins in a remonstrance can assail the proceedings upon the ground that no notice was given. It has often been held, that if no objection to notice is made its va-

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lidity can not be assailed even on appeal, and, surely, if objection can not be made on appeal, none can be successfully urged in a collateral attack. *Daggy v. Coats*, 19 Ind. 259; *Milhollin v. Thomas*, 7 Ind. 165; *Little v. Thompson*, 24 Ind. 146.

The land-owner can not, by a suit for an injunction, have a review of the assessment of benefits and damages. Questions respecting the assessment of benefits and damages must be litigated in the commissioners' court or on appeal. *City of Fort Wayne v. Cody*, 43 Ind. 197. If the proceedings are void, then an injunction will issue, but, where the proceedings are not void, a suit for injunction can not be maintained, no matter how erroneous the proceedings may be. *Cauldwell v. Curry*, 93 Ind. 363; *Smith v. Clifford*, 99 Ind. 113. Where there is jurisdiction of the subject-matter and notice, or an appearance, there is jurisdiction, and no irregularity can be made available in a suit for an injunction.

The petitioners succeeded in obtaining from the board of commissioners an order for the location and construction of a ditch, and also secured an order approving the assessment made by the reviewers. This appellant, and other land-owners, appealed from the judgment of the board of commissioners and the circuit court, on appeal, made and entered of record the following finding and judgment: "That the improvement prayed for in the petition is conducive to public health and welfare; that the route thereof is practicable, and that the assessments are made on lands owned by the defendants. Said assessments are not in proportion to the benefits derived therefrom; that they, the assessments, and each of them, are excessive and erroneous. Whereupon it is ordered and adjudged that the said assessments and each of them, together with the proceedings had and done before the board of commissioners of Wells county, be, and the same are hereby set aside, vacated and rendered of no effect, and the cause be remanded back to the board of commissioners for such further proceedings as may be required by law in

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the premises." No objection was made to this finding and judgment by any of the parties.

Where assessments are adjudged erroneous, and the other findings of the board of commissioners are approved by the circuit court, the entire proceeding is not vacated or annulled. All that the judgment before us does is to annul the assessments, for the reason that they are erroneous; in other respects the action of the commissioners was approved. It can not be justly assumed that the judgment of the circuit court had the effect to annul the entire proceedings, for all that it professed to do was to remand the case for a correction of the assessments.

The appellant assumes that the order remanding the case to the board of commissioners renders the entire proceeding void. We are not willing to hold that the action of the circuit court does entitle the appellant to treat the assessment as a nullity. The question is not whether the court erred in so ordering, but whether that order and subsequent proceedings are absolutely void. If it were granted that the order was erroneous, the conclusion deduced by appellant would not follow. A ruling may be palpably erroneous, and yet not a nullity.

It must be kept in mind that the circuit court did rightfully assume and exercise jurisdiction, and did hear and decide the case. There was, therefore, neither want of jurisdiction, nor failure to award a trial. There was a trial and a decision, and the utmost that can be granted the appellant, if, indeed, that much can be granted, is, that the decision and judgment were erroneous. The present case is not governed by the cases of *McPherson v. Leathers*, 29 Ind. 65, and *Mandlove v. Pavey*, 33 Ind. 505, for in those cases there was a refusal to award a trial, and the questions were directly presented by due exceptions and an appeal to this court. *Gavin v. Board, etc.*, 81 Ind. 480, simply decides that the circuit court must try the case *de novo*, but it neither considers nor decides the question here presented.

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The general statute respecting proceedings before the board of commissioners and referring to appeals from the decisions of the boards, expressly authorizes the circuit court to remand a case, when it deems proper, to the board of commissioners, and the effect of such a statute is to confer a very broad discretion upon the circuit court. It has been decided that this general statute authorizes the circuit court to remand a case arising under the ditch law. *Bryan v. Moore*, 81 Ind. 9. The same doctrine applies in highway cases. *Board, etc., v. Small*, 61 Ind. 318; *Wilkinson v. Bixler*, 88 Ind. 574. These authorities are certainly sufficient to prove that the order of the circuit court was not void. If it were granted that the order of the circuit court is not regular in form, and that it was wrongfully entered, it would do the appellant no good, for, if it was not absolutely void for want of jurisdiction, this collateral attack must be unavailing. *Cauldwell v. Curry*, *supra*.

The judgment of the circuit court, even if erroneous, carried the case back to the commissioners' court, and re-invested that tribunal with plenary jurisdiction. As that tribunal was re-invested with jurisdiction, its proceedings were not void, even if erroneous, and if not void they can not be successfully assailed in a collateral attack. It would not have been proper for the commissioners to question or disobey the order of the circuit court, for, even if that order was erroneous, the only remedy was by appeal. It is the duty of a party who is dissatisfied with an order, made in the progress of a cause, to interpose proper objections and reserve timely exceptions; if he omits this he is remediless, for he will be turned away without assistance, if he resorts to a collateral attack.

Judgment affirmed.

Filed Feb. 11, 1886; petition for a rehearing overruled April 14, 1886.

The Chicago and Eastern Illinois R. R. Co. v. Hedges, Administratrix.

No. 11,141.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. HEDGES, ADMINISTRATRIX.
RAILROAD.—Action for Damages.—Wilful Killing.—Sufficiency of Complaint.—

A complaint against a railroad company, to be good as charging wilfulness in the killing by a train of cars of a person for whose death damages are sought to be recovered, must show that the deceased was purposely or wilfully killed, or that the train was purposely or wilfully run upon him. It is not sufficient to charge that the acts in the management of the train, resulting in the death, were purposely and wilfully done.

SAME.—Trespasser.—A railroad company is not liable for the killing of a person unlawfully upon its track unless the killing be wilful.

SAME.—Use of Track as Part of Highway.—Where a part of a railroad track, not within the limits of a street, is habitually used by the public in approaching the railroad depot, with the knowledge and consent of the company, a person so using it is not a trespasser.

SAME.—Negligence.—Liability of Company.—Instruction.—An instruction that although the person injured was unlawfully upon the railroad track, "the company will be responsible if its employees are guilty of gross or reckless negligence, and could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness," is erroneous under any issue.

SAME.—Pleading.—In pleading, the words "gross negligence" and "recklessness" can not be substituted for wilfulness.

SAME.—Evidence.—Practice.—Evidence of wilful conduct is only available under a pleading charging wilfulness.

SAME.—Care Required in Crossing Track.—A person about to cross a railroad track must, to be free from negligence, take such precautions as could reasonably be expected from an ordinarily prudent person under like circumstances; but the fact that he does not, at the instant of stepping upon the track, look to ascertain if a train is approaching, is not conclusive of want of due care on his part.

SAME.—Contributory Negligence.—Deceptive Appearances.—Negligence can not be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent man.

SAME.—When Question for Jury.—When there is evidence tending to show that the plaintiff was thrown off his guard by conduct on the part of the defendant which might have such effect upon an ordinarily prudent man, it is proper to submit the question of contributory negligence to the jury.

INSTRUCTIONS TO JURY.—Signing.—Practice.—There is no available error

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128 501105 398
131 86105 398
134 677105 398
139 643105 398
141 100105 398
160 668105 398
161 200105 398
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171 594

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in refusing to give instructions asked by a party, where they are not signed as required by section 533, R. S. 1881.

INTERROGATORIES TO JURY.—*Motion for More Definite Answers.*—*Harmless Error.*—It is a harmless error for the trial court to refuse to require the jury to answer more definitely certain interrogatories submitted to them, when it appears that no answers which they could make would change the result.

From the Fountain Circuit Court.

T. F. Davidson, C. E. Booe and W. Armstrong, for appellant.

R. B. Jones, C. D. Jones, R. C. Gregory and W. B. Gregory, for appellee.

BLACK, C.—The appellee, administratrix of the estate of Daniel T. Hedges, deceased, brought her action against the appellant to recover damages for the killing of said Daniel by his being run against and over by a train of cars owned and operated by the appellant upon the track of the Indiana, Bloomington and Western Railway Company, in the town of Covington, on the 28th of March, 1883.

The complaint was in three paragraphs, all charging that the death was caused by the defendant's negligence, without negligence on the part of the intestate.

There has been some discussion as to whether the third paragraph charged a wilful killing, concerning which we will speak presently.

The answer was a general denial. A jury returned a verdict for the plaintiff for \$1,200, and answered interrogatories. The defendant objected to the receiving of the verdict and the discharge of the jury, and moved to require the jury to fully answer certain of the interrogatories, and to make their answers thereto definite and responsive. The court received the verdict and discharged the jury.

The defendant moved unsuccessfully for a *venire de novo*, for judgment on the answers to interrogatories notwithstanding the general verdict, and for a new trial, and judgment was rendered on the verdict.

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It will aid in the decision of the case to state the following facts: The defendant owned and operated a railroad which connected with the track of the Indiana, Bloomington and Western Railway Company, a short distance east of the depot of the latter company, at Covington, and, by an arrangement between said companies, used the track of said latter company between said place of intersection and Danville, Illinois. Main street, in Covington, crossed the tracks of said latter company, being one main track, lying east and west, and parallel therewith, two side tracks or switches. The defendant was moving a train of cars toward the west on said main track. At some distance east of said crossing, the engine was detached from the moving train and was run with quickened speed across said street to a water tank two hundred and forty feet west of said crossing, the train being left to follow, on a down grade, in charge of a brakeman. The plaintiff's intestate, a man seventy-three years old, having approached on said street, was struck, run over and killed by the train.

The jury found, in answer to interrogatories, that the deceased was approaching the railroad crossing from the north; that he was walking; that he was familiar with the locality of the crossing; that he had known of the existence of the railroad at that place for ten or more years; that he had been in the habit of going to the depot and crossing the railroad tracks frequently; that his business had taken him to the depot, at or about the same hour as that at which he was killed, on each week day for two or three months before he was killed; that he was on his way to the depot at the time he was killed; that the street on which he was walking ran nearly north and south, and crossed the railroad nearly at right angles; that the train was approaching the crossing from the east; that there were two side-tracks at the crossing, both lying north of the main track, one of them "near twenty feet" and the other "near eight feet" from the main track; that from a point forty feet north of the main track,

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the deceased could have seen "near one hundred and forty feet" up the main track in the direction of the approaching train; that had he looked when he reached the north side-track, he could have seen "near one hundred and sixty feet" east along the main track; that when he reached the south side-track, he could have seen "near two hundred and sixty feet" east along the main track; that the accident happened in the daytime; that the depot was west of the crossing and south of the main track; that the depot platform approached within five and one-half feet of the west side of the street and sidewalk crossing.

The twenty-third interrogatory was as follows: "Did the train conductor stand on the depot platform and shout a warning to the deceased?" The jury answered: "He hollowed." And they answered that this was not done before the deceased had crossed the south side-track, and that it was done before he had stepped on the main track.

To the question, "Was the conductor's warning in tone loud enough to be heard at the Craig House, one hundred yards away?" they answered, "We do not know."

They answered further, that there was a brakeman "at the brakes between the second and third cars, they being together;" that he did not shout a warning to the deceased while the latter was on the south side-track.

The thirtieth interrogatory was: "Did this brakeman shout a warning to the deceased before deceased reached the main track?" The jury answered, "He shouted."

They also found that the train was approaching the crossing at the rate of speed of about four miles per hour; that there were eleven cars in the train, all loaded; that for one-half a mile the main track approached the road crossing from the east on a descending grade of twenty-five to thirty feet to the mile; that the deceased, if he had looked in the direction of the approaching train, could have seen it in time to stop before stepping on the track in front of it; and that the

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train could not have been stopped after the deceased stepped on the main track and before it struck him.

The eighteenth, nineteenth and twenty-second questions and the answers thereto were as follows:

"18. Was the deceased struck within the limits of the street and sidewalk? We, the jury, are not agreed.

"19. Was the deceased struck west of the crossing and outside of the limits of the street and sidewalk? The jury are unable to agree.

"22. How far west of the east end of the platform was deceased when the train struck him? Jury are disagreed."

The allegations of the third paragraph, to which we need to direct attention, were as follows:

"Said defendant, by her said servants, did then and there carelessly, negligently, purposely, wilfully and recklessly detach said locomotive engine from said train of cars, they being then in motion, and run and drive said engine, detached as aforesaid, with quickened speed to the water tank, located about fifty yards west of said depot, near said last named road's track, negligently, purposely, wilfully and recklessly leaving said train to follow, there being a descending grade from thence to said depot, down which said engine and train of cars were then moving."

After mentioning certain obstructions to the view of one approaching said crossing from the north, the pleading alleged, "that on said 28th day of March, Daniel T. Hedges, in the pursuit of his lawful and then daily avocation, was walking in a southerly direction on said highway to said depot, located in the southwest angle of said crossing, and as he had reached said crossing and was in the act of passing over said main track, as he then had a lawful right to do, the defendant, by her servants and agents, carelessly, negligently, purposely, wilfully and recklessly caused said train of cars to approach said crossing, and negligently, carelessly, purposely, wilfully and recklessly omitted, by reason of their having detached and driven away the said locomotive engine

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as aforesaid, while so approaching said crossing, to give any signal by ringing the bell or sounding the steam whistle, or otherwise, by reason whereof the said Daniel T. Hedges was unaware of their approach; that by reason of said careless, negligent, wilful and reckless management of said train of cars, they were thereby driven and run against and upon said Daniel T. Hedges, and thereby caused his instant death, without any negligence or want of ordinary care on his part."

Notwithstanding the frequent use of the words "purposely" and "wilfully," the pleading does not charge that the defendant purposely or wilfully killed the intestate, or purposely or wilfully ran the train upon him, or purposely or wilfully caused it to be run upon him. The allegations amount to no more than a charge of killing through negligence. *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471 (17 Am. R. 719; *Cincinnati, etc., R. R. Co. v. Eaton*, 53 Ind. 307; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Indianapolis, etc., R. R. Co. v. McClaren*, 62 Ind. 566.

The record shows that the court refused to give to the jury a number of instructions asked by the appellant. It does not appear that these instructions or any of them were signed as required by the code. R. S. 1881, section 533. Therefore, the appellant can not be heard to complain of the refusal. *Stott v. Smith*, 70 Ind. 298, 303.

At the request of the appellee, the court instructed the jury as follows: "You are also instructed that, although a person may be improperly or unlawfully upon a railroad track, that fact alone will not discharge the company or its employees from the observance of reasonable care; and if such a person is run over by the train and killed or injured, the company will be responsible if its employees were guilty of gross or reckless negligence and could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness."

This instruction was clearly erroneous. If a person be unlawfully upon a railroad track, the railroad company, in

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moving its trains upon the track, does not owe him any duty except to not purposely or wilfully injure him. If he be wilfully injured, his contributory negligence will not prevent his recovery, but if he, by his own fault, contribute proximately to his own injury, he can not recover for the negligence of the company. Properly speaking, there are no degrees of negligence. The degree of care devolving on one as a duty depends upon a variety of circumstances, and negligence is a failure to perform such duty; but there can be no responsibility for injury caused by such breach of duty to one whose own fault contributed proximately to his injury. In pleading, the words "gross negligence" and "recklessness" can not be substituted for wilfulness, and if in evidence the conduct intended to be represented by those words can amount to wilfulness, it can not be so made available under a pleading which does not charge wilfulness. And it would be error to instruct a jury that under a pleading charging a wilful injury they might find for the plaintiff by merely finding that the defendant was guilty of negligence, though "gross or reckless negligence," for it would be necessary to find wilfulness.

The railroad company would not be liable for the negligent injury of a person in the situation supposed of the plaintiff in the instruction above quoted, and that instruction would be erroneous under any issue. *Cincinnati, etc., R. R. Co. v. Eaton, supra*; *Evansville, etc., R. R. Co. v. Wolf*, 59 Ind. 89; *Pennsylvania Co. v. Sinclair, supra*.

Some other questions need examination. The court instructed the jury as follows: "It is the duty of one approaching a known railway crossing to look along the line of the railroad track and see if any train is approaching, and if he fails to take this precaution, and goes on the track, this, under ordinary circumstances, would be negligence. If, however, in this case, you shall find from the evidence that the deceased was thrown off his guard and induced to refrain from taking this precaution by seeing the defendant's engine

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pass the crossing immediately before he stepped upon the railroad track, I will submit to you the question whether or not, under all the circumstances then surrounding the deceased, he was guilty of negligence."

One witness testified that after the engine had passed "a few moments," he heard the train come down. Another witness testified that it was not more than two minutes after the engine passed the waiting-room of the depot that the cars came down. Another testified that he could not tell how long the interval was; that he reckoned the cars were about four hundred yards behind when the engine passed the crossing. This witness testified that he rang the bell of the engine continuously from a point east of the crossing until the engine reached the depot, and that the whistle was blown for the crossing. Another witness, who crossed in advance of the intestate, testified that he crossed after the passing of the engine, and went into the depot and was inside when he heard a cry; that he jumped up and ran to a window and saw the cars run over the old man. The engineer testified that the engine was at the water tank when the accident occurred, and that it had been standing there about two minutes before he was aware of the accident. The fireman testified that the engine passed the crossing about two minutes before the cars came up.

There was evidence of obstruction of the view of the intestate as he approached the crossing, and that the train of eleven cars loaded with coal had been running without an engine something more than half a mile. For one-half a mile there was a descending grade of from twenty-five to thirty feet per mile. When the train approached the crossing it was running at the rate of about four miles an hour. The brake of the forward car was then set, and the brakeman was then at the brakes of the second and third cars, and the train when it struck the intestate was not more than two hundred and forty feet from the engine standing at the water

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tank. The train consisted of flat-cars, the highest being about six feet high.

It was not shown that the deceased knew the time of this train, but there was some evidence tending to show that he had not such knowledge.

A person thus about to cross a railroad, to be free from negligence, must take such precaution as could reasonably be expected of an ordinarily prudent person under like circumstances. It is upon this reason that the requirement to look and listen is based. So far as the precaution would be useless, it is not required. Whether reasonable caution was exercised by the intestate in approaching depended upon the nature and extent of his knowledge of facts and his opportunity for knowledge. He was required to act like an ordinarily prudent man. A prudent man's attention may be diverted so that he will fail to look and listen, and the evidence may be such as to make it proper to leave to the jury the question whether it was negligence for him to so fail. There may be circumstances which excuse the taking of the usually necessary precaution of looking and listening. See *Pennsylvania Co. v. Rudel*, 100 Ill. 603; *Laverenz v. Chicago, etc., R. R. Co.*, 6 Am. & Eng. R. R. C. 274; *Philadelphia, etc., R. R. Co. v. Troutman*, 6 Am. & Eng. R. R. C. 117; *Smedis v. Brooklyn, etc., R. R. Co.*, 88 N. Y. 13.

In *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435, 452, it was said, that while it is true that the failure of a railroad company to give warning does not relieve a person about to cross the track from exercising care to avoid injury, "yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required or not." See *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. St. 60, 71.

It would be a hard rule to impute to the injured person as his negligence a want of vigilance which could be said to have been produced by the defendant's negligence. Negli-

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gence can not be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent man.

The interval of time between the passing of the engine and the coming of the train might, under the evidence, have been found by the jury to have been very short, and considering this fact in connection with the evidence, that the whistle was sounded as the engine approached, that the bell was rung as the engine passed, that the cars, only six feet in height, came on without signal, that the view was obstructed, and that the intestate had no knowledge of the time of the train, the jury might conclude that the attention of the intestate was diverted, so that without negligence on his part he, for this reason, did not see the train in time to escape; that his conduct was influenced by the defendant's negligent acts, and he was thus thrown off his guard, so that without his having acted otherwise than as might have been excusable in a prudent man, under the circumstances, he was run down. Where the conduct of the defendant was plainly negligent and caused the injury, and there is dispute or doubt as to the negligence of the plaintiff, the conclusion of one man, though learned in the law, should not be forced upon twelve men sworn to try the facts. If there was any evidence tending to show that the plaintiff's intestate was thrown off his guard by such means as might have such effect upon an ordinarily prudent man—and we think there was some such evidence—it was not wrong to submit to the jury the question of contributory negligence.

If, without disagreement, the jury had returned definite and responsive answers to the interrogatories upon which they disagreed and those which they did not answer fully, and if the answers to such interrogatories, taken in connection with the other answers given, could not have controlled the general verdict and authorized a judgment contrary thereto, whatever might have been the character of the answers to the interrogatories which were not answered satisfactorily, then the appellant was not injured by the action of the court in refer-

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ence to those answers. *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143; *West v. Cavins*, 74 Ind. 265; *Noakes v. Morey*, 30 Ind. 103; *North Western Mut. L. Ins. Co. v. Heimann*, 93 Ind. 24.

We may examine whether there was any injurious error in such action of the court in connection with our examination as to whether the court erred in overruling the motion for judgment on the interrogatories, notwithstanding the general verdict.

That the answers to interrogatories may control the general verdict, there must be material conflict between the answers and the verdict; the answers must exclude every conclusion that would authorize the general verdict, and there must be a repugnancy that could not have been removed by any additional finding as to other facts which could have been made upon any evidence admissible under the issues. *Indianapolis, etc., R. R. Co. v. Stout, supra*; *Indianapolis, etc., R. R. Co. v. McCaffrey*, 62 Ind. 552; *Woollen v. Wishmier*, 70 Ind. 108; *West v. Cavins, supra*.

The question in issue was whether the deceased was killed through the negligence of the defendant, without his contributory negligence. Suppose that the jury, instead of disagreeing, had answered that the deceased was struck a few feet west of the line of the street. If he was a trespasser there could have been no recovery, for wilfulness was not in issue. But it would not necessarily follow from such an answer, that he was a trespasser. Under the issues, there might have been, without variance, evidence showing that the deceased was rightfully at such place outside of the limits of the street, as surveyed. The place where he was struck, while not within such limits, may have been used habitually by the public in approaching the depot, with the knowledge and consent of the defendant, as a part of the highway, and may thus have constituted a part of the public crossing. 1 Thomp. Neg. 416, 417, and authorities there cited. It might have been that the defendant would be liable for injuring him through

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negligence, whatever answers had been given by the jury to these interrogatories.

Without a finding upon a fact as to which no interrogatory was propounded, no answer which would control the verdict could have been made to the questions upon which the jury disagreed.

The appellant was dissatisfied with the answers to the twenty-third and thirtieth interrogatories. No answer which could have been expected would have shown exactly where the deceased was when the conductor and the brakeman shouted, or that he could have heard them, or that the defendant was not guilty of negligence which caused the intestate's death without his contributory negligence. An affirmative answer could not have rendered the special findings capable of controlling the general verdict.

It is earnestly insisted that the answers to the interrogatories in relation to the distance along the main track toward the east to which the deceased could have seen from certain points north of that track precluded recovery by showing contributory negligence. None of the answers showed that the cars could have been seen by him from such points; the places at which the train was when he was at those points were not found or inquired about. There was no finding as to the distance from the crossing to the place where the engine was detached, and it was not shown at what speed the intestate approached the crossing.

One of the answers indicated that if the intestate had looked in the direction of the train, he could have seen it in time to stop before stepping upon the track in front of it. This answer was not necessarily inconsistent with the existence of such facts, through the defendant's fault, as were reasonably calculated to distract the attention of the intestate and throw him off his guard, so that, without his being subject to the imputation of imprudence, he might have failed to look for the train. It has been held, that the fact that a person attempting to cross a railroad does not at the instant of stepping

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on it look to ascertain if a train is approaching, is not conclusive of want of due care on his part. *Plummer v. Eastern R. R. Co.*, 73 Maine, 591. See, also, *Pennsylvania R. R. Co. v. Ogier*, *supra*.

Under the motion for judgment, no presumptions can be indulged in this court against the general verdict, but all presumptions must be indulged in its favor. Notwithstanding these answers, there could have been evidence tending to establish facts, which, if stated in answers to interrogatories, would have shown the intestate not guilty of contributory negligence. *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168.

Certain specifications of causes in the motion for a new trial related to the admission of evidence as shown by a certain special bill of exceptions. The general bill of exceptions, purporting to contain all the evidence, shows the evidence to which objection was made to have been materially different from that shown in the special bill. In view of this discrepancy we will not further extend this opinion. The judgment should be reversed.

PER CURIAM.—Upon the foregoing opinion, it is ordered that the judgment be reversed, at the costs of the appellee, and the cause is remanded for a new trial.

Filed April 10, 1885; petition for a rehearing overruled April 20, 1886.

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No. 12,441.

BARNETT v. HARSHBARGER, ADMINISTRATOR.

HUSBAND AND WIFE.—*Act of April 16th, 1881.—Title.—Constitutional Law.*—

The subject of the act of April 16th, 1881, entitled "An act concerning husband and wife," is sufficiently expressed in the title to render such act constitutional.

SAME.—*Unity of Husband and Wife.—Rule of Common Law.*—The general

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rule of the common law, that the husband and wife, in legal contemplation, are one person, still prevails in this State.

SAME.—Contracts Between.—Not Governed by General Rules of Law.—The dealings between husband and wife can not be treated as ordinary contracts, nor are they governed by the general rule applicable to persons who are distinct and separate individuals.

SAME.—Statute of Limitations.—The general statute of limitations does not apply to transactions between husband and wife.

STATUTE OF LIMITATIONS.—Disability.—The statute of limitations begins to run at the time the cause of action accrues, although the party is under legal disability, but where it has fully run during such disability the action may be brought within two years after the removal thereof.

From the Montgomery Circuit Court.

L. J. Coppage, for appellant.

E. V. Brookshire, M. D. White, W. S. Moffett, B. F. Davis and *J. Brownfield, Jr.*, for appellee.

ELLIOTT, J.—There is evidence that the appellee's intestate received money from the appellant in 1868, and it is not disputed that she and John Barnett, the intestate, were married in 1863; nor is it denied that she continued to be his wife until his death, in the summer of 1884. Upon the close of the evidence the trial court instructed the jury to find for the appellee.

The appellant contends that the act of April 16th, 1881, entitled "An act concerning husband and wife," contravenes the provisions of the Constitution, and is void. The ground upon which this contention proceeds is, that the subject of the act is not sufficiently expressed in the title. We do not deem it necessary to enter upon a discussion of this question, for we regard it as conclusively settled against the appellant. *Hedderich v. State*, 101 Ind. 564 (51 Am. R. 768); *Elder v. State*, 96 Ind. 162; *State v. Cox*, 88 Ind. 254; *Warren v. Britton*, 84 Ind. 14; *Bitters v. Board, etc.*, 81 Ind. 125; *State, ex rel., v. Sullivan*, 74 Ind. 121; *State, ex rel., v. Tucker*, 46 Ind. 355; *Shoemaker v. Smith*, 37 Ind. 122.

The present statutes have removed the general disability of married women, so that ability is now the rule and disa-

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bility the exception. There is not, however, a complete and absolute removal of all disabilities, for the capacity to contract still remains somewhat abridged. *Rosa v. Prather*, 103 Ind. 191; *Castner v. Walrod*, 83 Ill 171 (25 Am. R. 369).

The fact that a plaintiff was under disability at the time the cause of action accrued does not prevent the running of the statute, for, notwithstanding the existence of the disability, it begins to run, and once it begins to run no subsequent disability checks it. *Wright v. Kleyla*, 104 Ind. 223. When it has fully run, then the person under disability has two years after the removal of the disability in which to sue, and no more. If this case is to be regarded as an ordinary one, and within these general rules, the court did not err in its instruction to the jury, for the statute began to run at the time of the demand, more than six years before the action was commenced, and the disability of coverture was removed more than two years before the commencement of the action.

We are of the opinion that transactions between husband and wife are not within the general rule, for they stand upon grounds essentially different from ordinary transactions. The dealings between husband and wife are not regarded as contracts in the strict legal sense. *Doe v. Hurd*, 7 Blackf. 510; *Fletcher v. Mansur*, 5 Ind. 267; *Resor v. Resor*, 9 Ind. 347; *Hileman v. Hileman*, 85 Ind. 1.

The rule of the common law was that husband and wife could not deal together, although their transactions were sometimes upheld in equity. Mr. Schouler, after stating the general doctrine, says: "And the husband's note, given to his wife and transferred by her, is equally void." Schouler Husband and Wife, sec. 369.

Mr. Bishop, after quoting the scriptural doctrine, and referring to the common law authorities, says: "Of course, therefore, he can not at law enter into any valid contract directly with her." 1 Bishop Rights of Married Women, section 35.

The rule of the common law proceeds upon the theory that

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in legal contemplation the husband and wife are one person, and not upon the theory that the wife is under a legal disability. This is unquestionably the common law, and that is a part of the law of the State, so that it still prevails unless abrogated either by the express words of the statute or by necessary implication. Our decisions declare that it has not been abrogated. In the carefully considered case of *Dodge v. Kinzy*, 101 Ind. 102, it is affirmed that the general rule of the common law respecting the unity of husband and wife has not been overthrown. The decision in *Mathes v. Shank*, 94 Ind. 501, recognizes the rule of the common law, and affirms that it exists except as changed or modified by statute. The doctrine of the Supreme Court of Massachusetts, declared in *Lord v. Parker*, 3 Allen, 127, was adopted in *Haas v. Shaw*, 91 Ind. 384 (46 Am. R. 607), and this court quoted with approval from *Lord v. Parker, supra*, the following observations upon the effect of the enabling statutes: "They are in derogation of the common law, and certainly are not to be extended by construction. And we can not perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him." This general doctrine is again asserted by the Supreme Court of Massachusetts in the recent case of *Kniel v. Eggleston*, 4 N. E. Rep. 573, where the cases are collected. The subject has been carefully investigated by the courts of New York, and a conclusion reached that exactly coincides with that of the Massachusetts court. *White v. Wager*, 25 N. Y. 328; *Savage v. O'Neil*, 42 Barb. 374; *Kelso v. Tabor*, 52 Barb. 125; *Corn Exchange Ins. Co. v. Babcock*, 57 Barb. 222; *Chambovet v. Cagney*, 35 Superior Ct. 474; *Perkins v. Perkins*, 7 Lansing, 19.

Mr. Kelly says: "The enabling statutes confer new rights and powers, but they are limited to those necessary for the protection of her separate estate, and she has not the power to contract generally, unless the statutes expressly, or by nec-

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essary implication, gave her that power." Kelly Cont. of Married Women, 127, n.

It is for the Legislature, and not the courts, to destroy the rule of the common law declaring the unity of husband and wife. It would be judicial legislation for the courts to overthrow a rule that has been one of the most firmly settled of our jurisprudence ever since the organization of the State, and was one of the rules of the common law long before our State or Nation came into existence. As long as this rule stands, and stand it must until overthrown by the Legislature, dealings between husband and wife can not be treated as ordinary contracts. As long as they can not be so treated, just so long must they remain outside of the operation of general rules applicable to persons who are in law and in fact distinct and separate individuals. The unity which a settled rule of law has recognized through so many years can not be disregarded, and it prevents the operation of the general statute removing the disabilities of married women. The question can not be disposed of by assuming that the disability of the wife alone prevents her from dealing with her husband, for, as we have seen, the husband who was free from disability, and at liberty to deal with all others except his wife, could not, at law, deal with her. The question is not whether disabilities have been removed, but whether the long prevailing rule of the law, declaring husband and wife to be one person, in legal contemplation, has been annulled. This question can not be solved by affirming that a disability has been removed, for there yet remains the positive rule that the husband and wife are one person. Until this rule is annulled they can not contract with each other as persons not bound together by marital ties, and so long as they can not thus contract the usual rules of law do not govern their transactions.

The policy of the rule of the common law has often been discussed, and its wisdom vindicated, but that does not now immediately concern us—for our work is done when we ascer-

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tain and declare what the law is—further than this, that, knowing, as we do, the policy of the rule, and that it exists, we have no power to disturb it. To disturb it would overthrow the settled policy of the common law, and, according to the theory of that law, create dissensions between husband and wife by requiring the wife to sue the husband during the existence of the marital relation, or lose her rights by lapse of time, thus creating discord and strife which it was the purpose of the common law to prevent. It needs no argument to prove that evil will result from a rule that requires the wife to watch lest the statute of limitations bar her rights and she be answered when she asserts her claim, after her husband's death, that, as she did not sue him within the statutory time, she must lose the money entrusted to him. It is not for the good of the world that a wife should be compelled to distrust her husband and deal with him as she would a stranger, in order that she may not have her rights swept away by the lapse of time.

We are clearly of the opinion that the trial court erred in applying to this case the general statute of limitations, as it did by the instruction given.

Judgment reversed.

Filed March 13, 1886; petition for a rehearing overruled May 13, 1886.

No. 12,284.

BAYS v. CONNER ET AL.

PARTNERSHIP.—*Scope of Business.*—*When Note Executed by One Partner in Firm's Name not Binding on Firm.*—One partner can not, in the absence of express authority, bind the firm or his copartner by a note executed by him in the name of the firm, in a transaction outside the scope of the partnership business, even where the money, property or chose in action for which the note is given is applied to the payment of a firm debt.

SAME.—*Agreement by One Partner to Pay Firm Debt.*—*Surety.*—Where one part-

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ner, upon a sufficient consideration, agrees to pay a firm liability, he thereby makes it his individual debt, the other partner merely standing as surety.

From the Marion Superior Court.

W. D. Bynum, A. T. Beck and J. S. Bays, for appellant.

L. Ritter, E. F. Ritter and B. W. Ritter, for appellees.

Howk, J.—In this case appellant Bays alleged in her complaint that, on the 5th day of April, 1882, the appellee Conner and Arthur L. Blue were partners, trading under the firm name of the "Central Printing Company;" that, on the day last named, the appellee and Blue, in their said firm name, executed to appellant their promissory note for \$500, payable six months after date to the order of appellant, with six per cent. interest from date and attorneys' fees; that such note was due and unpaid; and there was due thereon the sum of \$600, for which sum appellant demanded judgment.

The summons issued on this complaint was returned "not found," as to Arthur L. Blue. Appellee Conner separately answered by a denial, verified by his oath, of every material allegation of appellant's complaint. The issues thus joined were tried by the court at special term, by and before a special *pro tem.* judge, and a finding was made in favor of appellant Bays. Over the motion of appellee Conner for a new trial, the court rendered judgment against him, in appellant's favor, for the amount found due on the note. The record shows that twenty days after the rendition of the judgment against Conner, an appearance was entered to appellant's action by Arthur L. Blue, and a separate judgment was rendered against Blue for the amount due on the note. On the separate appeal of Conner to the court below in general term, the judgment of the special term against him was in all things reversed. From this judgment of the general term, appellant prosecutes this appeal to this court, and she has here assigned, as error, that the general term erred in reversing the judgment at special term.

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Appellee, in general term, assigned as error the overruling of his motion for a new trial. In this motion, the causes assigned for such new trial were, (1) the finding of the court is contrary to law, and (2) the finding of the court is not sustained by sufficient evidence. It is manifest, therefore, that the case is presented for our decision upon the evidence appearing in the record, and the law applicable to the facts established by such evidence. Appellant has made the opinion of the general term a part of the record on this appeal, and as it contains, we think, a fair summary of all the facts established by the evidence in this case, we adopt such summary of facts, as a part of our opinion, as follows:

"Conner and Blue were partners in the printing business, under the firm name of the 'Central Printing Company.' The firm was indebted to the Central Bank of Indianapolis, upon over-draft and note, to the amount of \$814.11, on April 7th, 1882, when the bank failed and closed. Conner settled with the bank for \$323.64 of this amount by an arrangement with the bank, by which he was allowed to set off against such amount an individual deposit of like amount, and he was credited with a like amount upon the books of the Central Printing Company. It was then agreed between him and Blue that the latter should settle with the bank for the remainder of the firm's indebtedness to the bank, and receive credit therefor upon the books of the firm. At this time the plaintiff, who was the mother of Blue's wife, held a certificate of deposit, issued by such bank, for \$140, and also another certificate for \$360, issued by such bank to the wife of Blue, but which, it is claimed by plaintiff, belonged to her. After the failure of such bank, Blue, who acted also as the agent for the plaintiff in the matter, procured the two certificates of deposit to be endorsed in blank, and with them settled with the bank the remainder of its claim against the printing company.

"In consideration of the assignment of these two certifi-

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cates, Blue, instead of executing his individual note, gave the note in suit. This was dated April 5th, but was not drawn until about April 7th, and after the suspension of the bank, and was not delivered until several days thereafter. No entry of this note was made upon the books of the firm by Blue, nor did Conner know of its existence until after Blue had absconded."

These were the material facts bearing upon the issues in the cause, which were established by the evidence appearing in the record. Upon these facts, it seems to us that the questions for our decision may be thus stated: Is the note in suit the note of the partnership, doing business under the firm name of the "Central Printing Company?" Or, do the facts established by the evidence show that Arthur L. Blue, as a member of such firm, was authorized to execute the note in suit, in such manner as to bind the firm or his co-partner, Conner, for the payment of such note? We are of opinion that each of these questions must be answered in the negative. The facts proved clearly show that the Central Printing Company was in no sense a trading or commercial co-partnership. As the firm name indicated, and as the evidence established, the business of the partnership was confined to the printing business. The Central Printing Company was indebted to the Central Bank of Indianapolis at the time the bank failed and ceased to do business, on April 7th, 1882. Of this indebtedness, Conner settled with the bank for \$323.64, out of his own individual means. As to the balance of such indebtedness, to wit, \$490.47, it was then agreed between Conner and Blue, upon a satisfactory and sufficient consideration, that Blue should assume and pay such balance to the bank out of his own personal means, and be credited with the amount of such payment on the books of the printing company. Of course, this agreement did not operate to discharge Conner from liability to the bank for the amount of the firm's indebtedness to it, which Blue assumed and agreed to pay. But, as between Conner and Blue, the effect of such

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agreement was to make so much of the firm's indebtedness to the bank, as had been thus assumed by Blue, his individual debt to the bank, for the payment of which he stood as the principal debtor, and Conner occupied the position of his surety. Under such agreement, Conner had the right to insist that, as between himself and Blue, the latter should pay the amount of the firm's indebtedness to the bank, which he, Blue, had assumed and agreed to pay out of his own proper and personal means. *Hayden v. Cretcher*, 75 Ind. 108; *Warren v. Farmer*, 100 Ind. 593.

The evidence in this case conclusively shows, we think, that the note in suit was executed in the firm name of the Central Printing Company by Arthur L. Blue, without the knowledge or consent, express or implied, of his co-partner Conner. It is further shown by the evidence, clearly and unequivocally, that the only consideration for the note in suit was the purchase by Blue of two certificates of deposit in a suspended and broken bank, at their face value, one held by Blue's wife and the other by his wife's mother, of whom the latter is the payee of such note and the plaintiff in this suit. Upon the case thus made by the evidence, it must be held, we think, that the transaction between the appellant and Blue, wherein the latter purchased from the former the two certificates of deposit in a broken bank, was not within the apparent scope of the business in which the Central Printing Company was engaged. This being so, the appellant was chargeable with notice, that the execution of the note in suit by Blue, in the partnership name of the Central Printing Company, was entirely outside the scope of his partnership authority, and that such note would not be binding on, nor evidence a valid debt of, such firm or Conner as a member of the firm. In such a case, the rule is that one partner can not, in the absence of express authority, bind the firm or his co-partner by a note, executed by him in the name of such firm, in a transaction wholly outside the apparent or actual scope of the partnership business; and this is so where, as in

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this case, it may appear that the money, property or chose in action, for which the note was given, was applied to the payment of a debt of the firm. *Smith v. Sloan*, 37 Wis. 285 (19 Am. R. 757); *Collyer Partnership* (Wood's ed.), pp. 641, 660 and 792, and notes; *Hickman v. Reineking*, 6 Blackf. 387; *Ditts v. Lonsdale*, 49 Ind. 521; *Graves v. Kellenberger*, 51 Ind. 66; *Hayden v. Cretcher*, *supra*; *Lucas v. Baldwin*, 97 Ind. 471.

In the case in hand, as made by the evidence, we are of opinion that the court, in general term, did not err in reversing the judgment against the appellee Conner, rendered at special term.

The judgment of the general term is affirmed, with costs.
Filed Feb. 19, 1886.

105	420
129	290
105	420
141	487
105	420
149	119

No. 12,255.

WILLIAMS v. THE THAMES LOAN AND TRUST COMPANY.

NEW TRIAL AS OF RIGHT.—*Not Proper in Action to Enforce Lien*.—Where it affirmatively appears that an action is to enforce a lien, a new trial as of right can not be granted.

SAME.—*Appeal—Practice*.—Where a new trial as of right is erroneously granted, it is proper to remand the cause for judgment upon the first finding or verdict.

SAME.—*Supreme Court—Marion Superior Court*.—Where the effect of a judgment of the Marion Superior Court, in general term, is to remand the cause for such error, it will be affirmed by the Supreme Court on appeal.

From the Marion Superior Court.

R. D. Logan, for appellant.

D. M. Bradbury, for appellee.

ELLIOTT, J.—On the 6th day of February, 1867, the party through whom the appellant claims title, bought the real estate in controversy at a tax sale made by the treasurer of the

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city of Indianapolis. A certificate of sale was issued by the treasurer, and, on the 16th day of April, 1869, a deed was executed to the purchaser. This deed was never recorded. On the 13th day of August, 1875, the appellee loaned to the owner of the real estate a large sum of money and took a mortgage to secure its payment. This mortgage was foreclosed in March, 1879, the real estate was sold to the appellee upon the decree of foreclosure, on the 26th day of April, of that year, and a deed executed to him by the sheriff on the 28th day of April, 1880. The tax sale conveyed no title because the taxpayer had personal property out of which the taxes could have been made.

This action was instituted in November, 1881, and is in form, as indicated by the frame of the complaint, an action of a dual nature, for the complaint seeks to quiet title, or, if this relief can not be obtained, to enforce a lien for taxes. There is, however, an admission of record which affirmatively shows that there was no question of title or possession involved in the cause. There were two trials, both resulting in a finding against the appellant; the finding on the first trial was vacated by the granting of a new trial as a matter of right.

The court erred in granting the new trial as of right. Where it affirmatively and decisively appears that an action is to enforce a lien, a new trial as of right can not be granted. *Jenkins v. Corwin*, 55 Ind. 21; *Butler University v. Conard*, 94 Ind. 353.

Where a new trial as of right is erroneously granted, it is proper to remand the cause for judgment upon the first finding or verdict. *Sharpe v. O'Brien*, 39 Ind. 501; *Gann v. Worman*, 69 Ind. 548. This was the legal effect of the judgment of the general term of the superior court in the present instance, and there is, therefore, no cause for a reversal.

Judgment affirmed.

Filed Feb. 18, 1886.

No. 12,360.

THE BOARD OF COMMISSIONERS OF MARION COUNTY v.
CENTER TOWNSHIP ET AL.

STATUTE.—*Forfeitures. — Construction.*—Statutes providing for forfeitures will not be extended by construction so as to work a forfeiture.

RAILROAD.—*Public Aid.—Forfeiture.—Repeal of Statute.—Case Criticised.*—That part of section 18 of the act of 1869 (Acts 1869, Spec. Sess., p. 92, section 4062, R. S. 1881), providing that a failure on the part of a railroad company, to which a donation has been voted, to complete its road within three years from the levying of the special tax, or within the additional year that might be given by the board of commissioners, should forfeit the right of the company to the donation, was repealed by the act of January 30th, 1873 (Acts 1873, p. 184). *Indianapolis, etc., R. W. Co. v. Board, etc.*, 70 Ind. 385, criticised.

SAME.—*Act of January 30th, 1873.—Order of Forfeiture by County Commissioners on Petition and Notice.*—Under the act of January 30th, 1873, there could only be a forfeiture when the county board, on the application of twenty-five freeholders and after notice, should make an order cancelling the donation.

SAME.—Such an order could not be made until after the expiration of three years from the placing of the tax upon the duplicate, and, if before that time the railroad company should expend in the construction of its road in the township a sum equal to the donation, there could be no forfeiture.

SAME.—*When Act of 1873 Applies to Proceedings begun under Act of 1869.*—Where a railroad company, to which aid was voted under the act of 1869, had until June, 1874, within which to complete its road, and the special tax was collected during the years 1871, 1872 and 1873, the act of January 30th, 1873, relating to the method of forfeiture, would apply.

SAME.—*Where Forfeiture not Declared, Railroad Entitled to Donation Notwithstanding Delay in Work.*—Where a donation was voted by a township under the act of 1869, to aid in the construction of a railroad, and there was no forfeiture under section 18 of that act, nor under the act of 1873, by which such section was repealed, nor under any subsequent act, the railroad company is entitled to the money donated, although its road was not completed until 1880. Act of March 7th, 1877, Acts 1877, Reg. Sess., p. 111.

SAME.—*Act March 11th, 1875.—Effect of Proviso.*—The act of March 11th, 1875, re-enacts the second section of the act of January 30th, 1873, only changing the time from three to five years, within which the railroad company shall expend in the township a sum equal to the donation, and the proviso to the act of 1875, that it shall not apply to any railroad where three years have elapsed since the special tax shall have been

106 422
127 474
105 422
130 98
105 422
137 493
105 422
143 66
105 422
145 219
147 700
105 422
166 186
166 192
166 201

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placed on the duplicate, merely denies to such company the benefit of the extension of time.

SAME.—*Alterations in Line.*—Alterations in the line of the road which do not change the terminal points, nor materially affect the general route, will not defeat the right of the company to a donation.

SUPREME COURT.—*Rehearing.*—*Amendment of Record.*—The Supreme Court will not grant a rehearing in order that the record may be amended.

From the Marion Superior Court.

S. Claypool and W. A. Ketcham, for appellant.

C. Byfield, L. Howland, S. M. Shepard, J. B. Elam, C. Martindale, H. N. Spaan, J. W. Baird, A. C. Harris and W. H. Calkins, for appellees.

ZOLLARS, J.—This case was disposed of below upon a special findings of facts and conclusions of law thereon. Whether or not the conclusions of law are correct, is the only question for discussion by this court.

In the examination of that question we shall confine ourselves to the points made by counsel in support of and against the conclusions of the trial court.

In March, 1870, the voters of Center township, upon a petition and order of the county board, as provided by the act of 1869, Acts 1869, Spec. Sess., p. 92, voted aid to the Indiana and Illinois Central Railway Company, in the way of a donation. The donation was voted upon a condition, as expressed in the petition, that no part of the money should be paid to the railway company until it had furnished a bond, with security, to the approval of the county board, that it would locate and build its principal machine shops in the township. At the June session, 1870, the county board granted the prayer of the petition, and made an appropriation and donation of the amount voted to aid in the construction of the railroad, made a levy to raise the amount, and ordered it placed upon the tax duplicate for collection. The appropriation and donation were made upon the condition of the filing of the bond as provided in the petition. Whether or not the whole amount was ordered to be collected in one year, is not shown by the

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special finding of facts, but it is shown that it was collected in the years 1871, 1872 and 1873, and passed into the county treasury. No question is made in argument as to the regularity and legality of the proceedings by and through which the money reached the treasury as a donation to the railway company. The railway company, within a year after the levy of the tax, commenced work upon its line of road in Center township, and at other points along its line, but did not complete its road ready for use within three years from the time the tax was levied. In 1873, and before the expiration of the three years, the county board made an order extending the time for the completion of the railroad until the 4th day of June, 1874. The road was not completed within the time thus extended.

In April, 1872, the Indiana and Illinois Central Railway Company executed and delivered to the Union Trust Company, of New York, for the benefit of the holders of its bonds, a trust deed to all of its property, rights of way, and rights of every kind, including its right to the donation voted by the township. The company having defaulted in the payment of the interest, the bondholders appointed a committee to have the trust deed foreclosed, bid in the effects of the railroad company, covered by it, for them, to organize a new company for the completion of the railroad on the line as located, in which new company the bondholders should receive and hold stock in proportion to the amount of their bonds, all of which was carried out. In January, 1875, the trust deed was foreclosed, and all of the property and rights covered by it were sold and purchased by the committee for the bondholders. In September, 1875, articles were filed with the secretary of state incorporating the bondholders under the name of the Indianapolis, Decatur and Springfield Railway Company, for the purpose of completing the railroad projected by the old Indiana and Illinois Central Railway Company. On the 4th day of November, 1875, this new company was consolidated with the Springfield, Decatur

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and Indianapolis Railway Company, under the name of the Indianapolis, Decatur and Springfield Railway Company. This company at once proceeded to build the railroad, and complete it from Indianapolis to Springfield, Illinois, but not ready for use along its whole line, nor in Center township, until 1880. The line of road, as projected by the old Indiana and Illinois Central Railway Company, was to begin at the city of Indianapolis, "and extend thence as nearly west as should be found practicable and convenient, by way of, or within half a mile of the towns of Danville, Rockville and Montezuma, in the State of Indiana, and Decatur, in the State of Illinois, in a direction leading to the city of Springfield, Illinois, and passing through the counties of Marion, Hendricks, Putnam, Parke and Vermillion, in the State of Indiana."

The road as built by the Indianapolis, Decatur and Springfield Railroad Company is upon the same general line projected by the Indiana and Illinois Central Railway Company, but the towns of Danville and Rockville are left from five to ten miles to the south. The bond for the shops was not and has not been given, but the principal machine shops of the Indianapolis, Decatur and Springfield Railway Company were erected in the township in 1880.

In 1877, after the foreclosure of the trust deed, the organization of the new company and the consolidation, the township, on the theory that the railroad company had forfeited all rights to the money, brought an action against the board of county commissioners to have the amount turned over and into the township fund. The township recovered a judgment for the full amount, with interest—\$71,102.48—in December, 1880. Neither the taxpayers of the township nor the railroad company were parties to that suit. In 1881, by an arrangement between the township trustee and the county board, \$13,375.55 was paid to the township trustee; the judgment of 1880 was set aside, and a judgment was entered for \$58,202.93, to draw five per cent. interest, and to be paid in

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instalments. Since then, and on the 28th day of June, 1882, the county board paid to the township trustee \$2,089.85 of the principal of the judgment, and \$5,820.30 interest thereon, of which amount \$2,910.15 was paid on the 28th day of June, 1882, and \$2,910.15 on the 7th day of February, 1883. The board having neglected and refused to make further payments, without a bond of indemnity against the claims of the taxpayers and the railway company, the township, in January, 1884, filed what is termed an amended complaint in the original cause between the township and the county board. In the complaint the judgment of 1880 is recited, the setting of it aside in 1881, the arrangement then entered into between the township and board, and the failure of the board to carry it out. It is sought by the complaint to set aside that arrangement and judgment, upon the ground that it is too uncertain to be enforced, that the trustee could not thereby bind the township, and to restore the original judgment of 1880, and the rights of the township thereunder. The Indianapolis, Decatur and Springfield Railway Company was made a party defendant, upon the ground that it was, and is, asserting some right to the money.

The railway company filed an answer, and also a cross complaint against the township, the board of commissioners and certain named taxpayers of the township. These taxpayers came in and filed a cross complaint against all the other parties, and asked that the amount of tax paid by them severally should be refunded. Prior to the 18th day of March, 1881, at which time the county board paid the \$13,375.55 to the township trustee and entered into the arrangement of settlement with him, the Indianapolis, Decatur and Springfield Railway Company had demanded the money from the county board. Prior to that time, also, the said taxpayers had demanded the amounts severally paid by them, but they did not make any demand within two years after the passage of the act of December 24th, 1872, Acts 1872, p. 56, nor within two years after June 4th, 1874. With the exception

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of the amounts paid the township trustee, as above stated, the money is in the county treasury, under the control of the county board, to be paid to the party rightfully entitled thereto.

We have thus given a general statement of the claims of the several parties and the leading facts embodied in the special finding of facts. Upon the facts so found the court below found as conclusions of law:

First. That the Indianapolis, Decatur and Springfield Railway Company is not entitled to any part of the fund.

Second. That the taxpayers are not entitled to any part of the fund.

Third. That the township is entitled to receive from the board of commissioners \$64,202.07, and that the board is entitled to costs from the taxpayers and railroad company.

Judgment was rendered accordingly, and affirmed at general term of the superior court.

If the Indianapolis, Decatur and Springfield Railway Company is entitled to the money, we shall have no occasion, under the issues, to consider the rights of the other parties as between themselves. Of course, no former arrangement or adjudication between the township and the county board can affect the rights of the railway company or the taxpayers, as they were not parties thereto.

The donation was voted, made and collected under the act of 1869, Acts 1869, Spec. Sess., p. 92. There was no time fixed in the petition, nor in the order by the board, within which the shops should be built. And they having been built without a bond, it is not claimed by any of the parties that the failure to give a bond in any way affected the rights of the railway company to the donation. Nor is it claimed that the railway company forfeited its rights to the donation by a failure to commence work upon its road within one year from the levying of the special tax. The finding is, that it did so commence work. The arguments in behalf of the township and taxpayers, which are earnest and

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able, are, that the railway company forfeited its right to the donation by a failure to complete its road ready for use within three years from the levying of the special tax, and within the additional year given by the county board.

These arguments are based upon the 18th section of the above act (R. S. 1881, section 4062), which provided, that a failure on the part of the railroad company to complete its road ready for use within three years from the levying of the special tax, or within the additional year that might be given by the county board, should forfeit the rights of such company to the donation, and that the money raised by such special tax should go into the general fund of the township. The act of December 24th, 1872, Acts 1872, page 56, further provided for the disposition of such money, forfeited by the railroad company. It is contended that so far as concerns the railroad company, and the donation in this particular case, the above section 18, and the above act of 1872, have remained in full force and effect. It is contended, on the contrary, by counsel for the railway company, that section 18, as to this feature of the forfeiture, and as applicable to this case, has been repealed by subsequent legislation. As we have seen, the railway company, under the extension given by the county board, had until the 4th day of June, 1874, within which to complete its road. Before that time the Legislature passed an act, which was in force from and after the 30th day of January, 1873, Acts 1873, p. 184. The first section of that act (R. S. 1881, section 4068), provides that no tax shall be placed upon the duplicate for the purpose of taking stock or making donations to railroad companies under the act of 1869, until such railroad shall have been permanently located in the township making the donation or taking the stock. The second section provided, that "in all cases where stock has been taken or donations made" by any township for the purpose of aiding in the construction of any railroad, pursuant to the act of 1869, and the special tax "has been placed upon the duplicate for col-

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lection," the auditor and treasurer should suspend the collection of such tax, and it should be carried forward on the duplicate without being returned delinquent until such railroad should be permanently located in the township, and an amount of money equal to the amount donated or stock taken should be expended in the construction of the railroad in the township. It was further provided in that section, that if the railroad company should not, within three years after the tax was placed upon the duplicate, expend in the actual construction of its road in the township an amount of money equal to the amount to be donated to, or stock to be taken in such company by the township, the board of commissioners might in their discretion make an order annulling and cancelling such subscription to the stock or donation of money, upon application of twenty-five freeholders, they having given thirty days' public notice immediately preceding the term of the commissioners' court at which such application was to be made. There was a proviso to the section making it the duty of the county board to order the tax to be at once collected, as though never suspended, when satisfied that the amount of the work done equalled the donation, etc.

It is contended by counsel for the township, that this act did not repeal or affect the 18th section of the act of 1869, and that if it did, it was only as to cases where the tax had not been placed upon the duplicate for collection, as mentioned in the first section, or was upon the duplicate and uncollected, as mentioned in the second section. This contention is not without force. But the distinction here sought to be made, seems to have been disregarded in the former adjudication by this court, and it has been held, without any kind of reservation, that the above act of 1873 repealed the 18th section of the act of 1869, so far as that section worked a forfeiture of the donation by the failure of the railway company to complete its road within three years after the levying of the special tax. In the case of *Wilson v. Board, etc.*, 68 Ind.

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507, it was claimed that the railroad company had forfeited its right to the donation by a failure to complete its road within three years after the levying of the special tax.

After stating that the act of 1873, *supra*, could not be reconciled with the 18th section of the act of 1869, it was said: "And therefore we think that these provisions of the supplemental act of January 30th, 1873, as the later expression of the legislative will, virtually repealed so much of said section 18 as provided that the railroad company, by its failure to complete its railroad ready for use within the time limited in said 18th section, would thereby forfeit its right to the appropriation asked for, and also the provision in said section 3 of said act of December 24th, 1872, that, upon the failure of the railroad company to so complete its road within the time limited, the taxpayers and parties against whom said levies stood charged should be released and discharged from the payment thereof." It was held in this case, that until a forfeiture is declared by the county board, under the provisions of the act of 1873, there is no forfeiture. The doctrine of this case, in its full scope, is reasserted in the cases of *Board, etc., v. Indianapolis, etc., R. W. Co.*, 89 Ind. 101, and *Caffyn v. State, ex rel.*, 91 Ind. 324.

In the case of *Sellers v. Beaver*, 97 Ind. 111, the point was again made, that the railroad company had forfeited its right to the appropriation, because it had not completed its road within three years after the levying of the special tax. It was held that the provisions of the act of 1873, as amended in 1875, are inconsistent with and repealed section 18 of the act of 1869, whether the appropriation be by way of donation or subscription for stock.

In the case of *State, ex rel., v. Board, etc.*, 92 Ind. 499, the aid was voted in 1869, and the tax was levied and collected in 1871 and 1872. The tax was not on the duplicate when the act of 1873 went into force, and the railroad was not completed until June, 1876, considerably more than three years after the levying of the special tax. For this reason it

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was claimed that the railroad company had forfeited the appropriation. In answer to this it was held that section 18 of the act of 1869, so far as it provided for a forfeiture by a failure to complete the road within three years, was repealed by the act of 1873.

It is true that in all these cases, except the last two, the tax was either not upon the duplicate or was upon the duplicate and uncollected; but that fact was not assigned as a reason for the decisions. They seem to have been made without reference to that fact, and the broad and general doctrine was stated that section 18 of the act of 1869, upon the subject of forfeiture by a failure to complete the railroads within three years, was repealed by the act of 1873.

If these cases should be limited in their scope, as contended by counsel, such a limitation would not avail the township nor the taxpayers in this case.

In their contention counsel overlook the facts, as stated in the special finding of facts, that the tax was collected during the years 1871, 1872 and 1873.

This finding brings the case within the act of 1873, upon the rule and contention insisted upon by counsel. It is true that the special findings do not show how much of the tax was collected in 1873, nor at what time in the year it was collected, but in view of the decisions above cited, and the rule that statutes providing for forfeitures will not be extended by construction so as to work a forfeiture, we can not assume and hold that the tax collected in 1873 was collected before the 30th day of January, at which time the act of 1873 went into force. Upon an examination of the whole case, the statutes and decisions, we are constrained to hold that the act of 1873 covered the case, and prevented a forfeiture by the simple failure on the part of the railroad company to complete its road within three years after the tax was placed upon the duplicate. The act of 1873 did not provide for a forfeiture by the lapse of time alone. It provided that if, within three years after the placing of the tax upon

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the duplicate, the railroad company should not have expended in the construction of the road in the township an amount of money equal to the amount donated, the county board might, in their discretion, upon the application of twenty-five freeholders, and notice, make an order annulling and cancelling the donation or subscription. Until such an order should be made, there could be no forfeiture under that act. Such an order could not be made until after the expiration of three years from the placing of the tax upon the duplicate, and if before that time the railroad company should have expended in the construction of its road in the township, an amount of money equal to the amount donated, there could be no forfeiture, and it became the duty of the county board to cause the tax to be collected. It is not shown that the county board, in the case before us, ordered a suspension of the collection of the tax, nor is it shown that any order was made annulling and cancelling the donation. There was, therefore, no forfeiture or cancellation of the donation, either under section 18 of the act of 1869, or the act of 1873, none under the act of 1869, because section 18 of that act was repealed by the act of 1873, and none under the act of 1873, because the county board never ordered or declared any. The cases above cited fully support this conclusion. If then, at any time during the year 1873, or subsequent years, the railroad company had expended in the construction of its road in the township, an amount of money equal to the amount donated, it would have been entitled to the donation, unless defeated in that right by subsequent legislation. This brings us to the act of March 11th, 1875, Acts 1875, Reg. Sess., p. 121. That was an act amending section 2 of the act of 1873. It is an exact copy of that section, except that the time within which the donations may be annulled and cancelled is fixed at five instead of three years, as in the section amended, and except the following proviso added: "*And Provided, further, That the provision of this act shall not apply to any railroad, in any case, where*

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three years or more have elapsed since the tax, in aid thereof, shall have been placed on the tax duplicate for collection."

It is contended that this act repealed section 2 of the act of 1873, amended thereby, and did not save this case, because the proviso excluded it, the tax having been placed upon the duplicate more than three years prior to the passage of the act. In support of this contention, we are referred to the case of *Indianapolis, etc., R. W. Co. v. Board, etc.*, 70 Ind. 385. That was a case to enjoin the collection of a tax levied in June, 1870. The tax was, of course, upon the duplicate, and uncollected in October, 1875, when the case was commenced. The appropriation was made for the purpose of taking the amount in the stock of the railroad company. The contention was, that the appropriation was forfeited under section 18 of the act of 1869, because the railroad company had not completed its road within three years after the special tax was levied. In the principal opinion, citing section 18 of the act of 1869, section 3 of the act of December 24th, 1872, and the case of *State, ex rel., v. Wheadon*, 39 Ind. 520, it was held that the tax was forfeited. No notice was taken of the act of January 30th, 1873, nor was notice taken of the fact that the case cited arose and was disposed of by the court before the passage of the act of 1873.

In disposing of the petition for a rehearing, it was said, that section 3 of the act of December 24th, 1872, was still in force, but the tax having been levied in 1871, was forfeited at the time of the passage of the act of March 11th, 1875, and that the act of 1873 having been repealed by said act of 1875, there was no law to support a tax which had been placed on the duplicate for collection more than three years prior to the said act of 1875. This case, although reported later, was decided before the case of *Wilson v. Board, etc., supra*. It is in conflict with the *Wilson* case and the other cases above cited in several particulars. It holds that there might be a forfeiture under section 18 of the act of

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1869 of an appropriation for stock. They hold that that section did not provide for such a forfeiture. It holds that when the tax was upon the duplicate uncollected, and three years had not elapsed from the levying of the tax until the taking effect of the act of January 30th, 1873, such tax was forfeited under section 18 of the act of 1869. They hold in such a case, that the act of 1873 repealed section 18 of the act of 1869, and provided a new mode of forfeiture. Thus far, at least, that case has been overthrown. The only thing said in the case, as to the force and effect of the proviso in the act of 1875, was, as we have seen, that the appropriation had been forfeited by the railway company before the passage of that act, and that as the act of 1873 had been repealed by the act of 1875, there was no law left to support the tax which had been placed upon the duplicate more than three years prior to the act of 1875. This statement is based, in the main, upon the assumption, which was a false one, that the rights of the railway company to the appropriation had been forfeited under section 18 of the act of 1869, before the passage of the act of 1875. This case was again in this court, and is reported in 89 Ind. 101.

In this later decision nothing is said as to the effect of the proviso in the act of 1875 upon the case. It may well be conceded that if the rights of the railroad company had been so previously forfeited, the act of 1875 would not have the effect of restoring them.

But that is not the case before us. Here, the right of the railroad company to the donation had not been forfeited before the passage of the act of 1875; at the time of its passage more than three years had elapsed since the tax had been placed upon the duplicate, and the tax had been collected and was in the county treasury. The effect of the proviso in the act upon such a case is a question not yet passed upon by this court, and one of no little difficulty.

If it be said that the act of 1875 repealed section 2 of the act of 1873, which it amended, it does not follow that sec-

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tion 18 of the act of 1869 was thereby revived, because the act of 1875 is as much in conflict with that section as was the section of the act of 1873 amended. If, then, at the time the act of 1875 was passed, the right of the railway company to the donation had not been forfeited, did that act cut off that right, and if so, in what manner? The right of the railroad company to the donation was given and fixed in the first instance by the vote of the taxpayers, the orders of the county board, the placing of the tax upon the tax duplicate, and its collection. Section 15, act of 1869, Acts 1869, Spec. Sess., p. 95, R. S. 1881, section 4059, provides that if after the special tax shall have been levied, and before it has been collected, the railway company shall have so far completed the road as to be entitled to receive the money, the same may be paid on the order of the board of county commissioners, out of any money in the county treasury, not otherwise appropriated, to be refunded to the county when such special tax shall have been collected.

The 16th section of the same act, R. S. 1881, section 4060, provides that no donation of money shall be made to any railroad company by the county board, until the railroad to be constructed shall have been permanently located, and work done and paid for by the company equal to the amount of the donation then made, and that not to exceed fifty per cent. of the money voted shall be paid to the railroad company, until the iron is laid upon the road and a train of cars shall have passed over the entire length thereof in the township.

The 17th section of the same act, R. S. 1881, section 4061, provides that after the money appropriated shall have been collected, the railroad company having fully constructed the railroad as contemplated in the petition, so that trains of cars shall pass over the same, shall have the right to demand and have said money paid over to it.

These sections, in connection with the other sections of the act authorizing the appropriation and collection of the money, are the sections which affirmatively fix the rights of the rail-

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road company to the money. It will be observed that they make the payment of the money conditional upon the amount of work upon the railroad, but they fix no limit within which the railroad shall be built, to entitle the company to the money donated.

Under these sections, whenever the road is built, the company is entitled to the money, be that within three, ten or any other number of years. Section 18 of that act, in no way bestowed any right, but provided for the forfeiture of the rights conferred by the other sections. The repeal of that section, therefore, could not and did not deleteriously affect the rights conferred by the other sections. Neither did the act of January 30th, 1873, confer any additional rights upon the railroad company. It abridged those rights by postponing the collection of the tax, and like section 18 of the act of 1869, provided for a forfeiture. To repeal that act, therefore, would be to remove an obstacle in the way of a speedy collection of the tax, and overthrow a provision authorizing a forfeiture of the rights of the railway company to the donation. If, then, the second section of the act of 1873 was repealed by the amendment of 1875, in what position did it leave the railway company in respect to the donation? Its right to the donation was given by the sections of the act of 1869, other than the 18th section. This right had not been forfeited under that section, nor under the act of 1873. The repeal of the latter act, which provided for a forfeiture, clearly did not work a forfeiture. It can not be said, therefore, that the repeal of that act left no law to support the tax, or the right of the railroad company to the donation, because its right to the donation did not rest upon that act, but upon the sections of the act of 1869, which conferred it. If the second section of the act of 1873 was repealed by the amendment of 1875, simultaneously with the repeal, the act of 1875 went into force; and if that act, by reason of the proviso therein, did not cover the case before us, then

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it would seem that the rights of the railroad company were left unaffected, with no means of forfeiture.

The leading provisions of the act of 1875 are, that if the special tax is upon the duplicate, its collection shall be suspended until the railway company shall have expended in the construction of its road, in the township, an amount of money equal to the donation, and that if such an amount shall not be so expended within five years, the county board, on the application of twenty-five freeholders, may, in their discretion, annul and cancel the donation.

The proviso is that the provision of the act shall not apply to any railroad company in any case where three years have elapsed since the tax in aid thereof shall have been placed upon the duplicate.

If this act and the proviso be given an absolutely literal interpretation, it must mean, and can only mean, that if in any case three years shall have elapsed since the tax was placed upon the duplicate, such tax shall not be suspended, and the county board shall not annul and cancel the donation, even though the requisite amount of work may not be done upon the railroad within the five years. Such an interpretation would not destroy or overthrow the donation in controversy, nor the right of the railroad company thereto; but, on the other hand, would continue them as they were before the act, with no means provided for their forfeiture. Such an absolutely literal interpretation evidently does not express the true intent of the Legislature in the enactment of the statute.

The true intention, doubtless, was not to exempt such railway companies from every provision of the act, but from the provision extending the time within which the company might do the work, and within which the county board might not declare a forfeiture of the donation.

It will not be necessary for us here to enter upon a discussion of the rules of construction that would justify such an interpretation of the act and the proviso thereto; nor shall we enter the debatable ground as to whether or not the act,

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by re-enacting the 2d section of the act of 1873, with the simple change of three to five years, and the addition of the proviso, repealed or continued that section in force.

First. Because if that section was thus continued in force, the right of the railway company to the donation not having been forfeited thereunder, so far as that act is concerned, is still intact.

Second. Because, if that section was repealed by the amendment of 1875, and that amendment did not embrace and cover the case before us, the right of the railway company to the donation, so far as that act is concerned, is still intact; and,

Third. Because, if the amendment of 1875 did embrace and cover the case before us, so as to extend the time within which the railway company might do the work, and within which the county board might not declare a forfeiture, the right of the railway company to the donation, so far as that act is concerned, is still intact, there having been no forfeiture declared under its provisions.

It may not be amiss to observe in passing that an absolutely literal interpretation of the act of 1875, as contended for, would lead to unreasonable results, by putting a limit upon railroad companies where three years had not elapsed since the placing of the tax in aid thereof upon the duplicate, while it imposed no limit at all upon companies where three years or more had elapsed since the tax in aid thereof had been placed upon the duplicate.

It may be observed, too, as tending in a very slight degree to show the purpose of the Legislature to exempt the cases named from the single provision extending the time, that in the proviso the word *provision*, and not provisions, is used.

And still further, it may be observed, that the evident purpose of the acts of 1873 and 1875 was not to hasten forfeitures of the rights of railroad companies to donations voted to them, but to liberalize and to extend the time to the

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companies within which to complete the roads and save the donations.

Section 18 of the act of 1869 provided for an absolute forfeiture, if the railroad should not be completed within the three years from the levying of the tax in aid thereof. The act of 1873 softened that rigid rule by providing that there should be no forfeiture until after three years, and not then, unless the board of commissioners, upon the petition of twenty-five freeholders and proper notice, should, in their discretion, annul and cancel the donation.

The act of 1875 provided for a like forfeiture, but extended the limit from three to five years within which the railroad company might do the required work, and within which the board of commissioners could not declare a forfeiture. If then, as we have concluded, the right of the railway company to the donation was not forfeited under the acts of 1869, 1873 or 1875, that right is still intact, unless defeated by subsequent legislation.

There has been no legislation since the act of 1875, providing for the forfeiture of the rights of railroad companies to donations voted to them.

In the spirit of liberality apparent in the acts of 1873 and 1875, the Legislature passed an act in 1877, which was approved on the 7th day of March, and went into force on the 2d day of July of that year. Acts 1877, Reg. Sess., p. 111. That act provides, that any railroad company then organized under the laws of the State, to which any township had made an appropriation of money to aid such company in constructing a railroad in or through such township, by taking stock in, or donating money to such company, shall have five years from the passage of the act in which to complete such railroad for use, and that, when so completed, the company shall be entitled to such appropriations. There is a proviso that the act shall not be so construed as to entitle any company to such appropriation that has failed to commence work upon its road within two years from the levying of the special tax

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for such purpose. The provision is of no importance in the case in hearing, because work had been so commenced.

This is a sweeping statute, and broad enough to cover all cases where donations had been made by townships to railroad companies. Whether or not it would cover and save a donation that had been forfeited under other statutes, we need not now decide. It very clearly covers cases like this, where such donations had not been forfeited. This act, perhaps, did not displace the act of 1875, so far as that act provided a means of declaring a forfeiture. But, however that may be, the act is not material in the case in hearing, because as we have before observed, no forfeiture of the donation, or the right of the railway company thereto, has been declared or taken place.

We have thus far treated the case as though there had been no foreclosure of the trust deed, and no sale of the rights, property and effects of the old Indiana and Illinois Central Railway Company, and as though the contest was between that company and the county board, township and taxpayers. As we have seen, however, the trust deed which covered the right of the old company to the donation was foreclosed in January, 1875, and all the rights and property of the old company of every kind were sold and purchased by the bondholders.

Holding this property and these rights, the bondholders were incorporated as a railway company, and that company consolidated with another, under the name of the Indianapolis, Decatur and Springfield Railway Company, which is the company engaged as a party litigant in this case. That this company succeeded to all of the rights of the old company in and to the donation, is not questioned in argument. It seems to be conceded that this question is settled in favor of the Indianapolis, Decatur and Springfield Railway Company, by the case of *Scott v. Hansheer*, 94 Ind. 1. We do not, therefore, go into an examination of that question.

At the time of the foreclosure, sale, incorporation and consolidation, in 1875, the money was in the county treasury.

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Whether or not a sufficient amount of work had been done at that time upon the line of the railroad in the township, to entitle the company to have the money paid over, is not developed by the special findings. But by 1880, and before any forfeiture had taken place or been declared under the laws, the Indianapolis, Decatur and Springfield Railway Company, successor to the old company, had constructed and completed the entire line of road, and thus became entitled to demand and receive the money so donated and paid into the county treasury.

Another question is made by the taxpayers, and that is, that the railroad was not constructed upon the line as projected by the Indiana and Illinois Central Railway Company, and as that line was described in its charter.

As we have seen, the railroad was constructed through the same counties in the State, between the same terminal points, and upon the same general line projected by the old company, unless the leaving of the towns of Danville and Rockville from five to twelve miles to the south was a material departure from that line. We do not think that this was such a material departure, if a departure at all, as will affect or defeat the right of the company to the donation.

All that is required in the way of a description of the line, in the articles of incorporation, is to give the names of the places from which and to which the proposed road is to be constructed, and each county into or through which it is intended to pass, and its length, as near as may be. R. S. 1881, section 3885.

The board of directors may make any changes of the line which do not change the general route of the road. R. S. 1881, sections 3903, 3913, 3914. It would seem from a reading of the statute, that it was not necessary to name the towns as in the old company's articles of incorporation. But, as there named, they were only fixed as points through or near which the road should pass if that was found to be convenient and practicable.

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It has been held that a subscription to stock will not be defeated by a change in the route of the railroad, although the change may be authorized by a subsequent alteration in the charter of the company, provided such a change does not make an improvement of a different character, and the interest of the subscriber is not materially affected thereby. *Banet v. Alton, etc., R. R. Co.*, 13 Ill. 504.

It has been held, too, that when the charter of the company authorizes changes to be made in the line of the road, the subscriber will be held to have contracted with reference to such possible changes, and will not be released thereby if they are within the limit fixed by the charter. *Colvin v. Liberty, etc., T. P. Co.*, 2 Ind. 511; *Railsback v. Liberty, etc., T. P. Co.*, 2 Ind. 656; *Sparrow v. Evansville, etc., R. R. Co.*, 7 Ind. 369; *Bish v. Johnson*, 21 Ind. 299.

It is apparent here, that the one condition upon which the donation was voted was, that the principal shops of the company should be erected in the township. It is not apparent or inferable, that the probable location of the line of road near to the towns named in any way influenced the vote. Nor is it shown that the leaving of those towns to the south of the road materially affected the interest of the voters or the township. So far as shown, the road was constructed through the township upon the exact line projected by the old company.

Prior to the payment of the \$13,375.55 to the township trustee, on the 18th day of March, 1881, and the subsequent payments made under the arrangement then entered into between the county board and the township trustee, the Indianapolis, Decatur and Springfield Railway Company demanded of the county board the money donated, and then in the county treasury. The exact date of the demand is not shown but for the purposes of this case it may be taken as having been made on the 18th day of March, 1881, and prior to the payments by the board to the township trustee. The railway company is, therefore, entitled to the \$65,000 and

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interest thereon at six per cent. per annum from the 18th day of March, 1881.

The judgment is reversed at the costs of Center township, and the cause remanded with instructions to the court below to make its conclusions of law in accordance with this opinion, and to render judgment in favor of the Indianapolis, Decatur and Springfield Railway Company, against the board of commissioners of Marion county, for \$65,000 and interest thereon at six per cent. per annum from the 18th day of March, 1881.

ELLIOTT, J., did not take any part in the decision of this case.

Filed Oct. 6, 1885.

ON PETITION FOR A REHEARING.

HOWK, C. J.—Center township, of Marion county, has presented in this cause a very earnest and elaborate petition for a rehearing, fortified as to matters of fact by numerous certificates and affidavits, and strongly supported by the able and exhaustive briefs of its counsel. On the other hand, a number of counter affidavits have been filed on behalf of the Indianapolis, Decatur and Springfield Railway Company, in whose favor the judgment below is reversed and the cause is decided by this court, in the principal opinion, and also a learned and carefully prepared argument by its counsel, in opposition to the petition for a rehearing.

The principal ground upon which the rehearing is prayed for is, that the record of the cause does not speak the truth as to one matter of fact, upon which our opinion is largely rested in deciding the case in favor of such railway company. The fact referred to, as specially found by the trial court, was substantially that such railway company, as the successor of the Indiana and Illinois Central Railway Company, some time prior to the trial of the cause, had located and built its principal machine shops within the limits of Center township. It is claimed in the petition for a rehearing, and cor-

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rectly so it appears, that the fact thus found by the court at special term is not true, but, on the contrary, the fact is, that the principal machine shops of such railway company are located and built beyond the line dividing Center and Wayne townships, in Marion county, and within the limits of Wayne township. It is further claimed, that this mistake of fact, as it is called, in the special finding of facts, had its origin in the mutual mistake of the counsel engaged in the cause, as to the actual and true location of the principal machine shops of the railway company. However this may have been, during the pendency of the cause in the court below, it is shown with reasonable certainty, as it seems to us, that the able attorney of Center township was fully informed of such mistake of fact in the special finding of facts, and that such railway company had, in fact, located and built its principal machine shops within the limits of Wayne township, and not, as specially found by the trial court, in Center township, before the oral argument of the case in this court was fully heard, or the cause was finally submitted for our decision. We were not informed of any mistake of fact in the record, but we heard and decided the cause, with the belief and upon the supposition that the record before us, as it ought to have done, imported "absolute verity."

Our decision of the cause, as presented by all the parties to the record, is adverse, and therefore is not satisfactory, to Center township. We are now asked, on behalf of such township, to grant a rehearing and a stay of proceedings in the pending appeal, until such time as the record below can be so corrected that it will "speak the truth."

This court has always refused, and in cases of as much magnitude and importance as the case in hand or more, to grant a rehearing in order that the record may be amended. *Warner v. Campbell*, 39 Ind. 409; *Pittsburgh, etc., R. R. Co. v. Van Houten*, 48 Ind. 90; *Cole v. Allen*, 51 Ind. 122; *State, ex rel., v. Terre Haute, etc., R. R. Co.*, 64 Ind. 297; *Merrifield v. Weston*, 68 Ind. 70; *Board, etc., v. Hall*, 70 Ind. 469;

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Mansur v. Churchman, 84 Ind. 573; *Robbins v. Magee*, 96 Ind. 174; *State v. Dixon*, 97 Ind. 125.

There is nothing exceptional in the case under consideration, so far as we are advised, which can or ought to induce us to depart from this long-established and reasonable rule of practice. On the contrary, we are of opinion that the case before us is one where this rule of practice ought to be closely adhered to and strictly enforced.

Upon the case as it was submitted to us by all the parties to the record, Center township included, and considering, as we must, in the absence of any sufficient showing to the contrary, that the record spoke the exact truth in regard to every fact therein found by the trial court, we are content with our original opinion herein, and adhere to the law of the case, as therein declared, on every material point. We have nothing to add thereto nor take therefrom. We need not, therefore, extend this opinion in the re-examination or further discussion of any of the questions involved in the cause.

The petition for a rehearing is overruled, at the costs of Center township.

ELLIOTT, J., was absent when the petition was considered and the rehearing denied.

Filed May 24, 1886.

105	445
198	500

No. 12,880.

WARTENA v. THE STATE.

CRIMINAL LAW.—*Mere Weakness of Mind no Excuse for Crime.*—Immunity from crime can not be predicated upon a merely weak or low order of intellect, coupled with a sound mind.

SAME.—*Power of Trial Court to Regulate Business and Sittings.*—It is the province of the *nisi prius* court to regulate the course of business during the progress of trials, and, during the term, to control its own sittings.

SAME.—*Requiring Night Argument.*—*Practice.*—Requiring counsel for the

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defendant in a criminal case to make a night argument, over a request for a postponement until morning, unless it be shown that rights of the accused were thereby affected, is not an available question on appeal.

SAME.—*Questions of Courtesy.*—*Supreme Court.*—The Supreme Court will not undertake to regulate mere questions of courtesy between counsel, or between *nisi prius* courts and counsel.

From the Jasper Circuit Court.

F. W. Babcock, for appellant.

M. H. Walker, Prosecuting Attorney, and *I. H. Phares*, for the State.

MITCHELL, J.—The grand jury of Jasper county, on the 8th day of January, 1885, presented to the circuit court, by indictment in due form, that one Weibern Wartena, on the 8th day of October, 1884, did unlawfully, feloniously, purposely and with premeditated malice, kill and murder one John Dreger. Upon being arraigned the accused pleaded "not guilty," with a special plea in which his insanity was alleged.

The issue thus made having been submitted to a jury, a verdict finding the defendant guilty as charged, and assessing against him the death penalty, was returned.

Overruling a motion for a new trial, judgment was pronounced on the verdict by the court.

The causes assigned in the motion for a new trial were:

1. Irregularity in the proceedings of the court, and abuse of discretion by which the defendant was prevented from having a fair trial, the particular grounds of irregularity being specified.

2. Error of law occurring at the trial, in that the court erred in giving certain instructions to the jury.

3. That the verdict of the jury was contrary to the evidence and the law.

4. Irregularity in the proceedings of the court, and in the conduct of the prosecuting attorney, specifying the particulars in which it was claimed the proceedings of the court and

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the conduct of the prosecutor were irregular and prejudicial to the defendant.

The only error assigned and relied on for a reversal is the overruling of appellant's motion for a new trial.

As respects the irregularity and abuse of discretion attributed to the court, and the alleged misconduct of the prosecuting attorney, it may be said, without reciting the facts set out in the bill of exceptions in detail, the error complained of in that regard is predicated on substantially the following:

It appears that after the evidence was closed one of the counsel for the accused concluded the opening argument for the defence at 6 o'clock on Friday evening of the last week of the term. The court announced that a recess would then be taken for one hour, until 7 o'clock, at which time the argument on behalf of the accused would be proceeded with. The principal counsel for the accused thereupon informed the court that the closing argument for the defendant devolved upon him; that he was not able to attend a night session, because of fatigue induced by constant and arduous labor in court in the daytime, and from loss of sleep consequent upon attendance upon members of his family who were sick at night; that from excessive exertion in court, and with attendance upon his family, he was worn out, and unfit to make an argument that night. Upon these considerations, urged by counsel, a postponement of the argument until morning was requested. The court, recognizing the hardship, nevertheless reminded counsel that it was near the close of the term, and that a large amount of record was to be read and signed. The prosecuting attorney thereupon urged the holding of a night session, so that he might make the closing argument and the case might be given to the jury the next morning in time to enable him to take the 11 o'clock train for his home. The request for a postponement was overruled, and it was ordered, over the defendant's objection and exception, that the trial be proceeded with at 7 o'clock, at which time the court required defendant's counsel to proceed with the argument. It is re-

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cited in the bill of exceptions, that the court did not require counsel "to conclude his argument, but only to begin the same and proceed as far as was convenient for him to do at said night session. The urgent business of the court pending and unfinished absolutely required the holding of a night session, and that this trial be proceeded with." During the course of the argument, which was proceeded with according to the order of the court, counsel for accused desired to make reference to a paper which had been read in evidence. Not being able to find the paper, he was informed that it was in the possession of the prosecutor, who, with the leave of court and without the consent of defendant or his counsel, had absented himself from the court-room and gone to his hotel, leaving his deputy, who had assisted him, in charge of the cause. When informed that the prosecutor had the paper for which inquiry was made, the court proposed to send a bailiff for it, but counsel said it was not necessary, as it had been commented upon by his associate in the opening argument.

During the closing argument on behalf of the State, the prosecutor stated to the jury that he did not hear all of the argument on behalf of the accused, for the reason that, being tired, he had gone to bed at his hotel, and was not present during all of the night session.

Upon the facts thus presented, it is elaborately argued that the constitutional privilege guaranteed in all criminal prosecutions, that the accused shall have the right "to be heard by himself and counsel," was invaded.

With respect to the question presented, while admitting to the fullest extent the sacredness of the right thus guaranteed, it is nevertheless the undoubted province of the *nisi prius* courts, in the exercise of a sound discretion, to regulate the course of business during the progress of trials. Included in this is the right, during the term, in a proper way, to control its own sittings.

The request of counsel for a postponement, based upon the

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reasons assigned, must have appealed at once to the clemency and consideration of the court, and we must suppose that under any other than extraordinary circumstances a postponement as requested would have been conceded.

Some considerations looking to the necessity of reaching a determination of the case are disclosed by the record, and others not disclosed, but known to the court, may have rendered an evening session desirable and necessary if it could be held without detriment to the rights of the accused. Notwithstanding the unfavorable situation of counsel, the record discloses that he addressed the jury without limitation as to time, and, for all that appears, said all that could be in extenuation of the crime with which the accused was charged.

The question, therefore, at most, relates to the personal discomfort of, and exactions upon, counsel; the imposition of labor when rest was needed. It does not rise to the degree of affecting any right of the accused, and until it rises to that level it can not become a subject for our consideration. Any attempt on the part of this court to regulate mere questions of courtesy between counsel, or between the *nisi prius* courts and counsel, could result in nothing more than to introduce confusion and embarrassment into the administration of public justice. We can not be made the arbiter in such disputes. So far as the record informs us, no legal right of the appellant was invaded.

The order directing a night session, and the continuance of the argument then in progress, since it does not appear that the accused was thereby deprived of the fullest presentation of his defence by counsel, can not be deemed an abuse of discretion on the part of the court.

The absence of the prosecutor during the argument of counsel after urging a night session is complained of. This, as also his reference to it in his closing argument to the jury, is a question of courtesy and propriety. These subjects must be left where they properly belong, to that sense of propriety

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which every gentleman at the bar is supposed to cultivate and manifest under all circumstances. We must presume, therefore, that the temporary absence of the prosecutor was upon sufficient grounds, and whether it was or not is a question which can not be determined on this appeal.

The only other ground upon which error is predicated involves the eleventh instruction, given upon the request of the State. It is as follows:

“Mere weakness of mind does not excuse the commission of crime. If one is of sound mind, he is responsible for his criminal act, even though his mental capacity be weak or his intellect of an inferior order.”

The instructions, taken together, presented the law of the case to the jury with accuracy and precision. Besides, the one complained of is correct in the abstract, and was applicable to evidence in the case.

The law does not undertake to measure the intellectual capacities of men. Imbecility of mind may be of such a degree as to constitute insanity in the eye of the law, but mere mental weakness, the subject being of sound mind, is not insanity, and does not constitute a defence to crime. The law recognizes no standard of exemption from crime less than some degree of insanity or mental unsoundness. Immunity from crime can not be predicated upon a merely weak or low order of intellect, coupled with a sound mind. *Somers v. Pumphrey*, 24 Ind. 231; *Patterson v. People*, 46 Barb. 625; *Buswell Insanity*, section 8.

No question is made upon the sufficiency of the evidence to sustain the finding of the jury.

We find no error in the record. The judgment is accordingly affirmed.

Filed Feb. 19, 1886.

Freeman v. Paul.

No. 12,367.

FREEMAN v. PAUL.

REVIEW OF JUDGMENT.—*When Will not Lie.*—Where the facts entitle a party to the relief awarded, a bill to review will not lie, even though the prayer in the complaint filed in the original action is not broad enough to cover the relief granted.

APPEARANCE.—*Duty of Party.*—*Recital in Summons as to Relief Sought.*—*Practice.*—Where a defendant is served with summons, it is his duty to appear and ascertain the nature of the cause of action alleged against him, and the fact that the recital in the summons does not fully inform him as to the relief sought, will not relieve him of the consequences of his failure to appear.

From the Vigo Circuit Court.

W. W. Rumsey, for appellant.

W. Eggleston and E. Reed, for appellee.

ELLIOTT, J.—The material facts contained in the complaint of the appellant are these: In 1878, the appellee obtained judgment against the appellant for \$268 on promissory notes, and also obtained a decree foreclosing a mortgage by which the notes were secured. In August, 1879, the judgment was paid by the execution of new notes for part of the amount due, and by payment in money of the residue of the judgment. Suit was brought on these notes in June, 1881, and a judgment and decree of foreclosure obtained by the appellee. After partial payments had been made on the judgment and decree, a certified copy was issued to the sheriff, a levy was made and the mortgaged premises sold. Two years after the sale, the appellee commenced a suit to set aside the judgment and decree, and obtained the relief sought. The relief prayed by the appellant is, that the decree and judgment obtained in the suit last brought by the appellee be reviewed and set aside. The complaint in the action in which the judgment sought to be reviewed was rendered, alleges that the judgment and decree rendered in June, 1878, was entered satisfied by the appellee's attorney, that he acted

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without her knowledge or authority, and that there was in fact no satisfaction of that decree and judgment. The prayer for relief is this: "She therefore asks the court to set the aforesaid satisfaction of said judgment aside, to cancel the last judgment aforesaid, and to permit her to have an order of sale issued on said first judgment, and for all other proper relief." The summons issued in the suit brought to set aside the entry of satisfaction, states that the defendant is required to "answer the complaint of Sarah J. Paul to set aside satisfaction of judgment."

The trial court did not err in sustaining the appellee's demurrer to the appellant's complaint. The facts stated in the complaint filed in the suit brought to cancel the entry of satisfaction, entitled the appellee to a decree of cancellation and to an order directing process to issue on the judgment. Where the facts entitle a party to the relief awarded, a bill to review will not lie, even though the prayer for relief in the complaint filed in the original action is not broad enough to cover the relief granted, but here the prayer is broad enough to warrant the relief decreed, so that the question is entirely free from doubt.

Where a defendant is served with summons, it is his duty to appear and ascertain the nature of the cause of action alleged against him, and he can not escape the consequences of his neglect to do this, upon the ground that the recital in the summons did not fully inform him of the nature of the cause of action, or correctly describe the relief sought.

Judgment affirmed.

Filed March 26, 1886; petition for a rehearing overruled May 14, 1886.

Wiley v. The State, *ex rel.* Brown, Auditor.

No. 10,828.

WILLEY v. THE STATE, EX REL. BROWN, AUDITOR.

105 453
150 690

STATUTE OF LIMITATIONS.—*Promissory Note.*—*Payment.*—*Pleading.*—To an answer to a complaint declaring on a promissory note, alleging that the cause of action did not accrue within twenty years, a reply that the defendant had made payments on the note within twenty years, which were endorsed thereon, and that the defendant "then and there and thereby acknowledged the validity of such note and promised to pay the same," is good.

SAME.—*Payment only Prima Facie Evidence of New Contract.*—*Rebutting Evidence.*—*Practice.*—Under sections 301 and 303, R. S. 1881, payment on the cause of action is only *prima facie* evidence of a new or continuing contract and may be rebutted by other evidence, but the question as to whether the rebutting evidence is sufficient is for the trial court. The Supreme Court will not weigh the evidence.

From the Lake Circuit Court.

M. Wood and *T. J. Wood*, for appellant.

Howk, J.—In this case appellant, Willey, the defendant below, has here assigned as errors the following decisions of the circuit court:

1. In overruling his motion for a new trial; and,
2. In overruling his demurrer to the second paragraph of the relator's reply to the second paragraph of appellant's answer.

Before considering any question presented by either of these alleged errors, it may be premised that the suit was brought by appellee's relator, Brown, auditor of Lake county, on the 13th day of April, 1881. The relator's complaint counted upon a joint and several promissory note, whereby the appellant and two other persons promised to pay to the State of Indiana, on or before the 19th day of March, 1854, the sum of fifty dollars, with interest thereon at the rate of seven per cent. per annum in advance, commencing on the 19th day of March, 1853, and agreed that, in case of failure to pay any instalment of interest, the principal sum should become due and collectible, together with all interest, and on any such

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failure to pay principal or interest when due, five per cent. damages on the whole sum due should be collected, with costs. In his complaint the relator alleged that the money evidenced by such note was borrowed by appellant from the then auditor of Lake county, out of the common school fund of such county; that the note and its endorsements were filed with such complaint; and that the note and the interest thereon were due and wholly unpaid.

The first paragraph of answer was a general denial of the complaint. In the second paragraph of his answer appellant said that appellee's cause of action did not accrue within twenty years.

Appellee replied, first, by a general denial. In the second reply to the second paragraph of appellant's answer, appellee said that the note in suit was partly paid by appellant within the past twenty years, to wit, appellant paid on such note, on the 19th day of March, 1873, the sum of ten dollars, and on the 12th day of April, 1872, the sum of thirty-five dollars, which payments were, at the times thereof, duly endorsed on such note and yet appeared thereon; and that such payments were made to the then auditor of such county, and appellant then and there, and thereby, acknowledged the validity of such note and promised to pay the same.

The court overruled appellant's demurrer to this second reply. This ruling is the second error assigned; but, in the natural order of things, it is the first error which should be considered and decided. We are of opinion that the second reply is clearly good, and that the court did not err in overruling the demurrer thereto. *McCallam v. Pleasants*, 67 Ind. 542, on p. 546, and cases there cited.

The cause was tried by the court, and a finding was made for the appellee in the sum of \$86.02, and over appellant's motion for a new trial, judgment was rendered against him in favor of the State for the amount found due on his note. The overruling of his motion for a new trial, as we have seen, is the first error assigned by the appellant. In such motion

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the only causes assigned for such new trial were, (1) that the finding of the court was contrary to the evidence, and (2) that such finding was contrary to law. These causes for a new trial present for our decision the single question, Is there legal evidence in the record of this cause which tends to sustain the finding of the circuit court on every material point? If this question must be answered in the affirmative, and we think it must, it is very clear that the judgment below must be affirmed; for it may be regarded as settled by our decisions, that this court will not weigh the evidence nor disturb the finding of the court or verdict of the jury, nor reverse the judgment below upon what might seem to us to be the weight of the evidence. *Swales v. Southard*, 64 Ind. 557; *Hayden v. Cretcher*, 75 Ind. 108; *Cornelius v. Coughlin*, 86 Ind. 461; *Western Union Tel. Co. v. Huff*, 102 Ind. 535.

The evidence clearly and conclusively shows that appellant made the payment of \$35 on the note in suit, which is credited thereon, at or near the time the credit is dated, to wit, April 12th, 1872, to the then auditor of Lake county. Of this payment appellant's counsel say: "It is only *prima facie* evidence of a new or continuing contract, and may be rebutted by other evidence." Doubtless this is a correct statement of the law of this State, applicable to the question under consideration, under the provisions of sections 301 and 303, R. S. 1881, which are re-enactments of sections 220 and 223 of the civil code of 1852. But the difficulty with appellant's defence, in the case in hand, is, that in the absence of rebutting evidence, appellee's *prima facie* evidence was amply sufficient to sustain the finding of the court in favor of the State; and the questions whether or not appellant's rebutting evidence was sufficient to rebut, overcome or outweigh such *prima facie* evidence, and also in relation to the credibility of appellant's rebutting witness and of his evidence, were questions for the circuit court, as the trier of the facts. In other words, we are met here with the question of the weight and credibility of evidence, with the advantage,

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as it always is in such cases, decidedly in favor of the decision of the trial court. Of course, that court has opportunities and facilities for the proper and correct determination of such questions, which we, as an appellate court, can not possibly have. Accordingly, in such cases, this court long since adopted the rule, and has since strictly adhered to it, to abide by the finding and decision of the trial court, and neither to disturb the finding nor reverse the judgment upon the weight of the evidence. In the case under consideration, we can not say from the record before us that the trial court erred in overruling appellant's motion for a new trial, and, therefore, we must presume in favor of the decision, that the court committed no error in refusing him a new trial. *Myers v. Murphy*, 60 Ind. 282; *Bowen v. Pollard*, 71 Ind. 177; *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245.

We find no error in the record of this cause.

The judgment is affirmed, with costs.

NOTE.—The death of the appellant, since the submission of this cause, having been suggested, it is ordered that the judgment of this court be rendered as of its May term, 1883, at which term the cause was submitted.

Filed March 26, 1886; petition for a rehearing overruled May 19, 1886.

No. 12,142.

LAMB ET AL. v. LAMB ET AL.

WILL.—*Contest of.*—*Trial by Jury.*—The provisions of section 409, R. S. 1881, providing for trial by the court of causes which were of exclusive equitable jurisdiction prior to June 18th, 1852, do not apply to a proceeding to contest a will, which is of statutory creation, and in such proceeding there is a right to a trial by jury.

SAME.—*Mental Capacity of Testator.*—*Witnesses.*—Sections 498 and 499, R. S. 1881, do not prohibit the parties, in a proceeding by heirs to set aside a

105	456
127	90
105	456
131	297
105	456
134	462
135	449
138	8
105	456
142	87
105	456
150	630
105	456
157	50
157	51
105	456
161	108
105	456
170	508

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will, from testifying as to facts relating to the mental capacity of the testator, although his executor be a party to the action.

SAME.—*Erroneous Statement in Will as to Advancements.—Evidence.*—For the purpose of showing the mental condition of the testator, evidence that the statements in the will that he had advanced the sums designated to the parties named are erroneous, is admissible.

SAME.—*Rational Disposition of Property.—Presumption.*—If a testator has made a rational disposition of his property, no presumption of unsoundness of mind can be drawn from the fact that the distribution is unequal.

SAME.—*Unequal or Unnatural Disposition of Property.*—Inequality or injustice in the disposition of his estate, is a circumstance which may be considered, with other circumstances, on the subject of the testator's mental capacity.

SAME.—*Prior Declaration of Intention.*—Where, prior to making his will and while in good health, the testator declared his intention to dispose of his property substantially as disposed of in the will, such fact tends to support the will.

SAME.—*Loss of Memory.—Testamentary Capacity.*—The loss of memory destroys testamentary capacity.

SAME.—*General Verdict.—Sufficient when Covers Issues.*—Where a general verdict covers all the issues and supplies a foundation for such a judgment as the law prescribes, nothing more than a general verdict is required.

From the Pike Circuit Court.

E. A. Ely and *W. F. Townsend*, for appellants.

J. W. Wilson, *F. B. Posey*, *E. P. Richardson*, *J. E. McCullough* and *J. H. Miller*, for appellees.

ELLIOTT, J.—The appellees instituted this action to set aside the will of Stanton Lamb, deceased.

The appellants asked the court to try the case and deny the appellees a right to a trial by jury, and this request was refused. In this there was no error. The issue in such an action as this was not one of exclusively equitable jurisdiction prior to June 18th, 1852, and, therefore, it is not within the provisions of section 409, R. S. 1881. The proceeding to contest a will in a court of law under our system is purely one of statutory creation, and the provisions of section 409, of the code of 1881, do not apply to such proceedings. *Trittipo v. Morgan*, 99 Ind. 269. In order to bring a case within the

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provisions of that section of the code, it must appear that the proceeding was such as was exclusively one of chancery jurisdiction, and a proceeding can not be of chancery jurisdiction which is the creature of a positive statute and was unknown to the old courts of chancery. The statute of 1843 gave a right to a jury trial in express terms, and this repels the implication that an action to contest a will was of exclusive equitable jurisdiction. The right to a trial by jury is treated as not open to question by the authors who have written upon the question. 1 Redfield Wills, 49, 50; Sackett Instructions to Juries, 432.

Several of the appellees were permitted to testify as witnesses upon the question of the mental soundness of the testator, and in the course of their examination gave testimony—as, of course, they could not avoid doing if they testified upon that subject at all—as to matters that occurred prior to the death of the testator. It is argued with much force and no little plausibility, that the appellees were not competent witnesses under section 499, R. S. 1881. We have given the question much consideration and our conclusion is, that the statute referred to does not prohibit parties from testifying in such a case as this and upon such a subject as the mental capacity of the testator. The question of the soundness or unsoundness of mind is fully open to investigation by both parties, and it is not a question upon which one party can speak of matters of which only he and the dead had knowledge. The question in such a case is essentially unlike a question that arises in cases where the issue is as to the execution of a contract, a deed, or the like, for, in such cases, the matter can not be generally known, and if the party should say what was not true, it would be impossible to contradict him; while, in such a case as this, the mental capacity of the testator may be proved or disproved by witnesses who knew him, whether parties or not, so that the subject is fully open to investigation. The purpose of the statute was to prevent undue advantage as against those whose interests

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would be unjustly prejudiced by permitting parties to testify as to matters which they assume were known only to them and the deceased, or as to matters which, from their nature, could only have been known to them and the dead. It was not intended to exclude parties from testifying in cases where the subject is one of which the knowledge that the parties profess to have is not hidden from all other living persons. There is nothing in the spirit of the statute, and certainly nothing in the letter, which excludes parties from testifying respecting matters open to the observation of all the friends and acquaintances of the deceased. Such a matter is the mental capacity of the testator, whose will is contested.

While we agree with appellees' counsel in the view that parties are competent witnesses upon the subject of the mental capacity of a testator, we do not concur in the narrow construction which they give the statute, for we think there are cases where the question turns upon matters connected with the execution of a will, in which parties would be incompetent witnesses. *Wiseman v. Wiseman*, 73 Ind. 112 (38 Am. R. 115), and cases cited; *Cupp v. Ayers*, 89 Ind. 60; *Cottrell v. Cottrell*, 81 Ind. 87.

It is argued that as the executor was a party to the action, the parties were incompetent witnesses under section 498, R. S. 1881. We think that statute does not apply to such a case as this, but that it applies to cases where a claim is asserted against a decedent's estate, or where a claim asserted by the representative of the decedent is resisted. We do not regard that statute as prohibiting heirs from testifying in a suit to set aside a will, as to the mental capacity of the testator, although his executor is a party to the action.

There was no error in permitting the appellees to prove that the statements in the will, that the testator had advanced the sums designated to the parties named, were erroneous. This evidence was competent for the purpose of showing the mental condition of the testator, and not for the purpose of contradicting the will. We agree with appellants' counsel

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that parol evidence can not be given to contradict or vary the statements of a will, and fully approve the rule declared in the cases of *Judy v. Gilbert*, 77 Ind. 96 (40 Am. R. 289), *Bunnell v. Bunnell*, 73 Ind. 163, and *Grimes v. Harmon*, 35 Ind. 198 (9 Am. R. 690).

In declaring the evidence offered in this case competent, we do not trench upon that rule, for we simply decide that the evidence is competent for the purpose of showing the mental condition of the testator. If a testator should declare in his will that he had given certain of his children or kinsmen large sums of money, and it should turn out that he had given them 'nothing, it would be some evidence that he was laboring under a delusion, or that his mind was shattered. If a man should state in his will that a child born to him in lawful wedlock was not his child, we suppose no one would doubt that it would be competent to show that he was laboring under a delusion. Or, to take as another illustration, the recital that is found in almost nine wills out of ten, that the testator "is of sound mind and disposing memory," certainly no one will contend that such a recital may not be contradicted. If such recitals may not be disproved, then all that need be done in any case is to embody them in a will and thus shut out all inquiry. Evidence that the testator did not correctly comprehend the true condition of his affairs and rightly appreciate the situation of those who were the objects of his bounty, is always competent, but its weight is, of course, for the jury. If a father, because of mental incapacity, should be deluded into the belief that he had given his son \$10,000, when in truth he had not given him a farthing, that fact would be some evidence, at least, of a lack of testamentary capacity.

The court gave the jury the following instruction :

"A person competent to make a will may disinherit all of his children, and bestow all of his property upon strangers, or he may give his property to one or more of his children and disinherit the others, or he may bequeath more of his

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property to some than to others of his children, and the motive for so doing can not be questioned, and the hardship of the case can have no other weight further than a circumstance, tending with other testimony to show the insanity of the testator.

"It is a question of fact for the jury, from the evidence in this case, whether Stanton Lamb made an unequal or unnatural disposition of his estate; if he did so, the weight to be given to that fact must be determined from a consideration of the circumstances in the case.

"In determining the true character of the will in question, in reference to the parties to this suit, it will be proper for you to consider the pecuniary circumstances of the respective parties at the time the will was made.

"If, upon full consideration of all the circumstances connected with the making of this will, you find that the testator has made a rational and reasonable disposition of his property, no presumption of unsoundness of mind can be drawn from the fact that he bestowed a larger share of his property upon the defendants than upon the plaintiffs.

"It is proper for the jury to consider, with this part of the case, any declaration which may have been made by the testator prior to the making of the will, in regard to the disposition he intended to make of his property.

"And if it should be found that when he was in good health, in writing or otherwise, he declared his intention to dispose of his property substantially in the same manner it is disposed of in the will in suit, it is an important fact to be considered in determining the validity of this will and as tending to its support."

This instruction asserts the law correctly, and is in strict conformity to the rule declared in *Bundy v. McKnight*, 48 Ind. 502, see p. 509. There is no justice in counsel's criticism, that the instruction told the jury that "it is a hardship for the testator to give all his property to part of his children and disinherit the others." The plain reason for this con-

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clusion is that the criticism rests upon a mistake. The instruction did not, as counsel erroneously assume, tell the jury that it was a hardship for the testator to give all of his property to a part of his children and disinherit the others, but, on the contrary, properly submitted the whole matter to the jury.

It is the law that an unnatural, or, as the old books put it, an undutiful disposition of property, is a circumstance tending to prove a lack of testamentary capacity. Such a disposition of property does constitute a circumstance, to be considered with other circumstances, upon the subject of the testator's mental capacity. It is possible that if the parts of the instruction referred to by counsel were detached from the words with which they are associated, they might be deemed to have worked the appellants harm, but they can not be detached, since it is the rule of reason, as well as of law, that instructions must be taken as an entirety.

The fourth instruction asked by the appellants was embraced within that given by the court, and there was, therefore, no available error in refusing it.

The second instruction asked by appellant reads thus: "Failure of memory is to be considered in connection with other circumstances tending to show mental derangement, but failure of memory is not sufficient incapacity, unless it goes to the extent of such a loss of memory as to deprive the testator of the ability to call up to the mind the immediate members of his family and property. Memory is generally impaired by age and also by disease, while the mind may remain entirely rational; and if Stanton Lamb's mind was rational at the time of making the will, the mere loss of memory will not be sufficient to set it aside." There are, at least, two faults in this instruction: *First*. It assumes facts which ought to be left to the jury. *Second*. It affirms that loss of memory does not destroy testamentary capacity. The latter fault is a very grave one, and of itself condemns the instruction. A man without a memory can not make a will.

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A general verdict is sufficient where the issue submitted to the jury is, whether a testator, whose will is assailed, was or was not of unsound mind, and this was the issue submitted to the jury in this instance, for the court instructed the jury that there was no evidence upon the question of undue influence. We regard it as quite clear that a general verdict is sufficient on a single issue, such as the one here submitted to the jury for decision. It would, indeed, have made no difference if both questions, that of testamentary capacity and of undue influence, had gone to the jury, as a general verdict would have covered both, and furnished ample foundation for a judgment. Where a general verdict covers all the issues and supplies a foundation for such a judgment as the law prescribes, nothing more than a general verdict is required.

The evidence yields the verdict satisfactory support.

Judgment affirmed.

Filed Feb. 19, 1886.

No. 12,848.

THE STATE, EX REL. FRENCH, v. JOHNSON, AUDITOR.

DRAINAGE.—Repairs.—Duty of County Surveyor.—Payment from County Treasury.—Constitutional Law.—Section 10 of the drainage act of April 6th, 1885 (Acts 1885, p. 129), making it the duty of the county surveyor to keep the ditches, constructed under the drainage laws of the State, in repair, and to certify the cost thereof, including his own per diem, to the county auditor, who shall draw his warrant in favor of the certificate-holder upon the county treasury, the latter to be subsequently reimbursed by assessments against the benefited land-owners, is constitutional.

SAME.—Mandate to Compel Auditor to Draw Warrant.—Mandate will lie to compel the county auditor to draw such warrant.

SAME.—Powers of Surveyor Discretionary and not Judicial.—The power devolved upon the county surveyor by said section 10 of the drainage act of April 6th, 1885, is not a judicial, but merely a discretionary one, and such as the Legislature has power to confer upon administrative and ministerial officers.

106	468
186	512
106	468
147	495
106	468
154	620
106	468
161	242

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SAME.—Appropriation.—The setting apart by section 10 of such act of so much of the county revenue as is necessary to pay the cost of the repairs provided for therein is a sufficient appropriation made by law within section 3, article 10, of the Constitution.

SAME.—Appeal.—Day in Court.—The appeal to the circuit court authorized by such section from assessments made by the county surveyor is sufficient to afford any aggrieved party a day in court.

From the Gibson Circuit Court.

T. R. Paxton, for appellant.

L. C. Embree, for appellee.

NIBLACK, C. J.—This was a proceeding by the State, on the relation of George W. French, against John W. Johnson, auditor of Gibson county, for a writ of mandate to compel the latter to draw a warrant on the county treasurer to pay for the repair of a ditch under the provisions of section 10 of the drainage act of April 6th, 1885, Acts 1885, p. 129.

The complaint charged that under the "act to enable the owners of wet lands to drain and reclaim" the same, approved March 9th, 1875, a petition was presented to the board of commissioners of Gibson county, at its June term, 1880, by resident freeholders, praying for the drainage of certain lands in that county by the construction of a ditch therein particularly described; that the board considered the matters presented by such petition and appointed viewers to examine the premises described; that said viewers reported in favor of the proposed drainage, and that it would be a work of public utility and beneficial to the public health; that such other and further proceedings were had in the premises as resulted in the construction and completion of the proposed work, which became known as the "Richland Creek Ditch;" that in August, 1885, Alexander H. Polk, then and still the surveyor of the said county of Gibson, acting under and pursuant to the provisions of the drainage act approved April 6th, 1885, contracted with George W. French, the relator, to clean out and repair the said Richland creek ditch, the same being then out of repair and in places partly

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filled up; that the said French had fully performed his contract by cleaning out said ditch, under the supervision of the said Polk, as such surveyor, and restoring the same to its full dimensions, both as to width and depth, as required by the original specifications when it was constructed; that after inspecting and measuring the work so done by the said French, the said Polk, as such surveyor, on the 28th day of November, 1885, executed his certificate in writing, in which and whereby he certified to the said Johnson, as auditor of said county of Gibson, the cost of such work, and that there was due and owing to the said French the sum of \$607.37 for the cleaning out and repairing of said ditch as stated; that said French presented said certificate to the said Johnson, auditor as aforesaid, and demanded of him a warrant upon the county treasurer for said sum of money so certified to be due him, the said French; that said Johnson refused, and still refuses, to draw a warrant as he was requested to do, and said sum of money still remains due and unpaid; that there was at the time of the presentation of said certificate, and still is, ample funds in the county treasury, belonging to the county revenue, for the payment of the sum so certified to be due by the county surveyor.

Johnson entered an appearance to the action, and waiving the issuing and service of an alternative writ of mandate, demurred to the complaint. His demurrer was sustained, and final judgment was rendered in his favor upon demurrer.

Section 10 of the act of April 6th, 1885, makes it the duty of the county surveyor to keep the ditches in his county, constructed under any of the drainage laws of the State, now or heretofore in force, in repair to their full dimensions as to width and depth required by the original specifications prescribing their dimensions, and to certify the cost of keeping the same in repair, including his own per diem, to the county auditor of his county, who shall draw his warrant upon the county treasurer in favor of the persons to whom the money

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shall be owing for making the repairs, which warrant shall, for the time being, be paid out of the county revenue, the county treasury to be reimbursed by the assessment of the cost of such repairs upon the lands adjudged to have been benefited by the construction of the proper ditch, in like proportion as benefits were assessed against such lands in the first instance for the construction of such work. The section also requires the county surveyor to make a record of such assessments, to be kept in his office, open to public inspection, and to post up written or printed notices of such assessment in three public places in each township in which the assessed lands are situate, and near to the work done in making the repairs, and to note on the record, so to be kept in his office, the times and places of posting up such notices.

An appeal to the circuit court from the proceedings of the county surveyor by any person feeling himself aggrieved is then authorized, such appeal to be tried by the court without a jury, and the only question, to be tried being to determine the cost of the repairs in question, and what amount of such cost should be assessed against the appellant's lands.

The objection made to the sufficiency of the complaint is that the foregoing section of the statute is unconstitutional, and hence ineffectual to support the proceedings to which effect is sought to be given:

First. Because the power therein attempted to be conferred upon the county surveyor to certify the cost of repairs caused to be made by him, as well as to the amount of his own per diem, is a judicial power which the Legislature can not confer upon any but a judicial officer.

Secondly. Because the section requires money to be paid out of the county treasury in a method other than in pursuance of an appropriation made by law, within the meaning of section 3 of article 10 of the Constitution.

Thirdly. Because the mode prescribed by the section of charging the cost of repairs upon adjacent lands, without affording the owners the opportunity of an appeal upon all

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questions affecting their interests in the premises, is in derogation of the constitutional rights of such owners.

The duties imposed upon administrative, as well as ministerial officers, pertain to, and are but subordinate parts of, the executive authority of the State. A county surveyor is recognized by section 2 of article 6 of the Constitution as an administrative officer, but his duties are ministerial, as well as administrative.

It is well settled that the Legislature can not confer judicial power upon other than judicial officers. That question was reviewed and carefully considered in the recent case of *Elmore v. Overton*, 104 Ind. 548. But the constitutional restraint thus resting upon the Legislature, as to conferring judicial powers upon other than judicial officers, does not prohibit that body from entrusting large discretionary powers, in certain cases, to executive, administrative and ministerial officers in matters pertaining to the duties of their respective offices. The cases in which officers of this class must seek information as to the existence, or non-existence, of certain facts, and must then form a judgment, and act accordingly, upon whatever information they may be able to obtain, are too numerous to be specifically referred to or enumerated. A county superintendent of common schools examines applicants for a license to teach in such schools, and grants or refuses a license in particular cases in the exercise of an official discretion. *Elmore v. Overton, supra.*

A sheriff exercises his judgment and a discretion in accepting sureties when taking bail for the appearance of a prisoner in his custody. The county auditor is required to examine and settle certain accounts chargeable against his county, and to draw his warrant for such sums of money as may be found to be due from the county upon such examination and settlement. R. S. 1881, section 5896. Township trustees exercise a discretion in granting or refusing relief to poor persons, or persons claiming to be poor. The discretionary power devolved upon the county surveyor by the section of

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the statute under consideration is not greater than, or different in kind from, that exercised in the instances above given. On this subject reference is made to other illustrations contained in the case of *Flournoy v. City of Jeffersonville*, 17 Ind. 169. The power so devolved upon the county surveyor is, consequently, not a judicial power.

The section in question sets apart so much of the county revenue of each county, as is necessary for that purpose, to the payment of the cost of keeping the ditches within its limits in repair. That is, in legal effect, an appropriation by law of so much of the county revenues of the several counties as is necessary to keep the ditches of the State in repair.

The appeal authorized from the assessments made by county surveyors for the repair of ditches is as full and complete as is the appeal allowed from the award of appraisers for assessment of damages to lands appropriated for railroad purposes. *Pittsburgh, etc., R. W. Co. v. Swinney*, 97 Ind. 586. It is, also, as full and complete as the appeal authorized from assessments made by cities for benefits resulting from the improvement of streets. R. S. 1881, section 3165; *Martindale v. Palmer*, 52 Ind. 411. Other similar illustrations might be drawn from appeals permitted in other purely statutory proceedings. See R. S. 1881, section 4301.

The sufficiency of the appeals in these last named cases, to afford an aggrieved party a day in court, has been, at least impliedly, recognized in numerous cases, and is no longer, if it ever was, seriously questioned.

The section of the statute attacked in this case is not, therefore, obnoxious to any of the constitutional infirmities held to exist in the sections of the statute referred to, and ruled upon, in the cases of *Campbell v. Dwiggins*, 83 Ind. 473, and *Tyler v. State, ex rel.*, 83 Ind. 563.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed March 5, 1886.

Boyle v. The State.

No. 12,617.

BOYLE v. THE STATE.

CRIMINAL LAW.—Evidence.—Dying Declarations.—A dying statement made by the victim of a homicide, that the defendant had no reason that he knew of for the perpetration of the crime, is the statement of a fact which the declarant would have been allowed to make had he been a witness on the stand, and is admissible in evidence. ZOLLARS, J., dissents.

SAME.—General Character of Rule.—The rule governing the admission of dying declarations is the same in all cases, whether the defence is insanity, self-defence or an alibi.

SAME.—The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the latter.

SAME.—Cross-Examination of Defendant.—A defendant in a criminal case who elects to testify as a witness is to be treated, so far as the cross-examination is concerned, as any other witness.

SAME.—Evidence.—Cross-Examination.—While the cross-examination of a witness must be confined to the subject opened by direct examination, this rule does not restrict such cross-examination to the specific facts developed by the direct examination; and when a subject is once entered on in the examination in chief, it is opened to a full and detailed investigation on cross-examination.

SAME.—Instructions to Jury.—Where an instruction stands alone upon one material point, neither explained nor qualified by any others, and erroneously expresses the law, there should be a reversal; but where it forms one of a series bearing upon a given question, and taking the entire series together the law is correctly stated, the rule is otherwise.

SAME.—Testimony of Defendant.—An instruction to the jury in a criminal case, where the defendant has testified, to the effect, "that such testimony is to be received and weighed as in the case of the testimony of any other witness, and if in such case the defendant has testified to the commission of any other or different crime from the one for which he is being tried, you will not, nor have you the right to, consider such testimony for the purpose of punishing him for the crime here charged, nor must you talk about it in your jury room for that purpose, nor permit it to prejudice you, or bias your judgment against the cause of the defendant. But you may consider such evidence, if any there be in this case, in determining what credibility should be given to the defendant's testimony," is not erroneous.

SAME.—Murder.—Manslaughter.—Provocation.—An instruction which directs the jury that mere words do not constitute such a provocation as will reduce an unlawful killing from murder to manslaughter, is not erroneous.

105	469
124	453
105	469
132	228
132	323
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135	264
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140	302
141	30
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145	509
147	33
105	469
149	402
149	406
149	407
151	515
105	469
153	564
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154	636
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164	269
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165	185
165	678
105	469
170	212

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SAME.—*Murder in Second Degree.—Self-Defence.*—For instructions on these subjects see opinion.

SAME.—*Practice.—Argument of Counsel.*—In the course of his argument in a homicide case, the prosecuting attorney, referring to the defendant, said: "Will you believe this man, this person who has told so many lies, and who has just seen the shadow of the gallows!"

Held, not sufficient cause for reversal.

From the Allen Circuit Court.

H. Colerick and *W. S. Oppenheim*, for appellant.

C. M. Dawson, Prosecuting Attorney, for the State.

ELLIOTT, J.—This case is here for the second time, *Boyle v. State*, 97 Ind. 322. One of the questions now argued by appellant's counsel was decided adversely to the appellant on the former appeal, and to that decision we adhere, not simply on the ground that it is the law of the case, but for the further reason that we believe the point was well decided. The question of which we are speaking, and of which we say that it was well decided on the former appeal, arises upon that part of the dying declarations of the deceased, wherein, in replying to the question: "What reason, if any, had the man for shooting you?" he said: "Not any that I know of, he said he would shoot my damned heart out." It was held that this was not the expression of an incompetent opinion, but was the statement of a fact, and we will not depart from that ruling. In the opinion given upon the former appeal, the following authorities were cited: *Wroe v. State*, 20 Ohio St. 460; *Rex v. Scaife*, 1 M. & R. 551; *Roberts v. State*, 5 Texas Ap. 141; Wharton Crim Ev., section 4.

The gravity and importance of the case, it is thought, justify us in referring to authorities that have come to our notice since the delivery of our former opinion, and in briefly discussing the question, although we do not deem it necessary to enter upon a very full discussion of the subject.

In *Payne v. State*, 61 Miss. 161, it was held that the statement of the deceased that the defendant shot him "without cause," was not the expression of an opinion.

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The statement of the deceased in *People v. Abbott*, 4 W. C. Rep. 132, was, that "the man cut him with a knife, and that he had no cause for it whatever," and it was held to be the statement of a fact.

The statement of the dying person in *State v. Nettlebush*, 20 Iowa, 257, was in answer to a question whether the shot was accidental or intentional, and the answer was that "it was intentional." The evidence was held competent, but without any discussion.

In *Brotherton v. People*, 75 N. Y. 159, it was held that the statement, that "he, the deceased, did not at first recognize the defendant, but when the latter drew his pistol and commenced his pranks, he knew that it was the prisoner."

These authorities fully sustain our former ruling, and neither our own search nor that of counsel has resulted in finding any opposing decisions, except that of *Collins v. Commonwealth*, 12 Bush (Ky.), 271. That case disposes of the whole question in a single sentence, refers to one authority—1 Taylor Ev. 644—and that authority goes no further than to declare what is undoubtedly the general rule, that an opinion expressed in a dying declaration is not competent.

The decision in *People v. Fong Ah Sing*, 5 Crim. Law Mag. 64, is that it is improper to permit narratives of previous occurrences to be given in a dying declaration. What was there said by the court, and all that was said upon the subject, was: "Dying declarations are restricted to the act of killing and to the circumstances immediately attending it, and forming a part of the *res gestæ*. When they relate to former and distinct transactions, they do not come within the principle of necessity on which such declarations are received." It is evident, therefore, that the case cited is not in point, and this is true of the other cases declaring a similar doctrine, that are cited by counsel.

There is no substantial difference in the meaning of the word "cause" and the word "reason," as used in this instance in the dying declarations of the deceased. The jury

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could not have misunderstood the import of the word as used in the question addressed to the deceased, nor could he, for it is quite clear that it asked and required him to state what cause there was for the killing. If it be held that a dying man may not declare in general terms that there was no reason or no cause for the act of his slayer, then it will be practically impossible to ever get before the jury a statement on that point, for it is not possible for any one, much less a dying man, to state all the circumstances and facts upon which the conclusion that there was no cause or reason for the killing is based. The truth is, that such a conclusion is not the expression of an opinion, but it is the statement of a conclusion of fact from observed facts, which, under all authorities, is competent in such a case as this. *Bennett v. Meehan*, 83 Ind. 566 (43 Am. R. 78); *Yost v. Conroy*, 92 Ind. 464, see p. 471 (47 Am. R. 156). The cases all agree that dying declarations are admissible in a case where the evidence would be competent if the declarant were on the witness stand, and if the statements of the deceased can, in any sense, be deemed the expression of an opinion, the opinion belongs to that class which the authorities agree a non-expert witness may express without stating the facts on which it is based. *Bennett v. Meehan*, *supra*, and authorities cited, p. 569; *People v. Hopt*, 9 Pacific Rep. 407. The cases upon this subject are very numerous, but most of them will be found in *Lawson Expert and Opin. Ev.* 468-534; *Rogers Expert Test.*, pp. 6, 7, 8; *Best Ev.*, section 505; *Wharton Ev.*, section 512; and *Stephens Ev.*, art. 26.

It was not asserted in our former decision that an opinion found in a dying declaration is competent in a case where it would not be so if expressed by a witness on the stand. On the contrary, the general rule that matters contained in a dying declaration are not competent unless they would be admissible if they came from the lips of a living witness, was declared and approved. *Montgomery v. State*, 80 Ind. 338 (41 Am. R. 815); *Binns v. State*, 46 Ind. 311.

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What we decided in the former appeal and now reiterate is, that the evidence here objected to was competent because it would have been competent if it had come from a witness present in court. We need not discuss the general rules governing the admission of dying declarations—they are rudimentary—for the question here is, not what the general rules are, but whether the declarant's statement was one that a witness on the stand would have been allowed to make. The declarations of Casey do not refer, as did the statement in *Montgomery v. State, supra*, to the purpose with which an act was done by another, but they simply declare that there was no cause for that act. A cause is often a fact, not merely an opinion, and it is here a fact.

The statement of the dying man was not an expression of an opinion as to the sufficiency of the cause or reason that the accused had for shooting, nor was it the expression of an opinion upon any subject, nor was it a narrative of a past occurrence, but it was the statement of a negative fact, namely, that there was no reason or cause whatever for the shooting. The declaration does not assume to be the expression of an opinion, but it professes to be, and in truth is, the statement of a fact, for, if there was no reason or cause whatever, no opinion could be given as to its sufficiency or insufficiency. Whether there is any cause for an act must be a fact, but if it be conceded that there is a cause, then, whether it was or was not adequate might well be deemed matter of opinion.

As we have suggested, negative facts can only be proved by a denial, since to enter upon a process of elimination and exclusion would lead to an almost endless examination. If a negative fact like that here under discussion can not be proved by a general statement, then it would be necessary to enumerate every conceivable thing, and deny in detail that it existed. A practical science, such as the law is, requires no such procedure as that; if it did, it would be practically impossible to establish a negative fact. There are many instances in which what is in appearance a conclusion, but in reality a

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fact, may be stated in evidence. We suppose that it can not be doubted that where the issue is whether a verbal agreement was entered into, it is competent to state in general terms that there was no agreement. So, in a case where the question is whether liquor was or was not sold, it is proper for the defendant to deny the sale. So, too, it is perfectly competent for a party to state that he relied upon the representations of another. There are many cases, far too numerous to justify mention, in which it is proper to make a general statement in denial.

There is an essential difference between a statement denying a thing and one admitting the existence of a thing and qualifying its character. Thus, to declare that liquor was sold, but not illegally, or that a man was struck, but not unlawfully, would, so far as the qualifying words are concerned, be a conclusion; if, however, those words should be struck out facts only would remain.

Whether the defence in a case of homicide is insanity, self-defence, or an *alibi*, can not change the rule governing the admission of dying declarations. There is not one rule for defences of insanity, another for self-defence, and still another for the defence of an *alibi*, but there is one rule for all cases. The question in all cases is to be determined irrespective of the nature of the defence. It can not affect the question in this instance, that the defence was that of self-defence. It would violate settled principles of logic and of law to hold that the accused might by the character of his defence change the rule as to the admissibility of dying declarations.

The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the latter. *Sylvester v. State*, 71 Ala. 17; *State v. Johnson*, 76 Mo. 121; *Lister v. State*, 1 Texas App. 739.

A defendant in a criminal case, who elects to testify as a witness, is to be treated, so far as the cross-examination is concerned, as any other witness; this defendant did elect to testify as a witness, and hence is to be treated as any other

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witness upon cross-examination. He put himself in the position of a witness, and as a witness he must be regarded. *Thomas v. State*, 103 Ind. 419; *Commonwealth v. Nichols*, 114 Mass. 285 (19 Am. R. 346); *State v. Ober*, 52 N. H. 459 (13 Am. R. 88); *Connors v. People*, 50 N. Y. 240.

The cross-examination of a witness must be confined to the subject opened by direct examination. This settled rule does not, however, restrict the cross-examination to the specific facts developed by the direct examination, but does confine it to the subject of that examination. Where a subject is opened by the direct examination, the cross-examining counsel may go fully into the details of the subject, and is not confined to the particular part of it embraced within the questions asked upon the direct examination. A subject can not be so partitioned by a direct examination as to cut down the cross-examination to the specific matters developed by the questions of the counsel who conducts the examination in chief, for, once a subject is entered upon, it is opened to a full and detailed investigation on cross-examination. *Bessette v. State*, 101 Ind. 85; *Wachstetter v. State*, 99 Ind. 290 (50 Am. R. 94); *Hyland v. Milner*, 99 Ind. 308; *DeHaven v. DeHaven*, 77 Ind. 236, see p. 239.

In this instance, the accused, when on the witness stand, had given an account of his movements upon a day named, and it was proper to go fully into the subject upon cross-examination, and the State was not confined to the particular period of time designated in the questions asked on direct examination.

We agree with the counsel for the appellant, that where the accused goes to the jury upon the theory that he acted in self-defence, it is error to set up as the standard by which to determine whether he, in good faith, believed himself to be in danger, an ideal or imaginary man. *Batten v. State*, 80 Ind. 394. While we agree with counsel in their view of the legal proposition, we can not adopt the construction which they place upon the instruction, for, in our judgment, it will not

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bear that construction. The instruction does not, as counsel assume, set up an ideal man as the standard by which the jury must measure the conduct of the accused, for it directs their attention to real men and things.

The twentieth instruction given by the court reads thus: "Malice may be proved by direct evidence, such as prior threats, or seeking an opportunity to perpetrate the act. This is called express malice, and proof of such malice in this case would be evidence of premeditation, and would make the case murder in the first degree, if otherwise made out beyond a reasonable doubt. Malice may also be implied from the act of killing; as if the killing is done purposely and without justification, legal excuse or reasonable provocation. And if the act is perpetrated with a deadly weapon so used as to be likely to produce death, the purpose to kill may be inferred from the act."

The counsel for appellant treat this instruction as if it stood alone, and in doing so violate the elementary principles of logic as well as the settled principles of law. We have again and again decided that instructions are not to be disposed of by a process of dissection, but are to be taken as a whole. It would be unreasonable to expect that one instruction should cover an entire case, or that the jury should take the law from one of a series of instructions. Where an instruction stands alone upon one material point, neither explained nor qualified by any others, then it might with reason be affirmed that if it erroneously expressed the law there should be a reversal, but where it forms one of a series bearing upon a given question, and, taking the entire series together, the law is correctly stated to the jury, it is otherwise. *Indiana, etc., R. W. Co. v. Cook*, 102 Ind. 133; *Hodges v. Bales*, 102 Ind. 494; *Walker v. State*, 102 Ind. 502; *Story v. State*, 99 Ind. 413; *Koerner v. State*, 98 Ind. 7; *Goodwin v. State*, 96 Ind. 550; *McDermott v. State*, 89 Ind. 187; *Achey v. State*, 64 Ind. 56; *Binns v. State*, 66 Ind. 428.

Taking the instructions together, as we must do, they so

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fairly gave the law to the jury that the appellant has no just reason to complain. But, if the instruction stood alone, we do not believe that there is any error in it that would warrant a reversal, although it may, perhaps, be subject to verbal criticism. The express malice of which the instruction speaks is that evidenced by threats and the efforts to secure opportunities to slay the deceased, and it is certainly not error to charge the jury that the uttering of threats and the effort to secure an opportunity to kill the deceased may be regarded as evidence of premeditation. The only point wherein the instruction is justly subject to criticism is in that it tells the jury that such express malice "would make the case murder in the first degree, if otherwise made out, beyond a reasonable doubt;" but, considered in connection with the other parts of the instruction, it is clear that the statement quoted could not have misled the jury. The meaning conveyed is, that, if all the other elements of murder in the first degree were proved beyond a reasonable doubt, then proof of previous threats and efforts to kill would make out a case of murder in the first degree. This is correct as an abstract proposition of law, for if all the other ingredients of the crime were proved, as purpose, malice, and the like, then premeditation would be established by such express malice as the court referred to, namely, previous threats and efforts to secure an opportunity to kill. As the court had told the jury what were the essential ingredients in the crime of murder in the first degree, and had defined premeditation, the jury must have understood that the case was not "otherwise made out," unless premeditation, as defined by the court, was proved beyond a reasonable doubt, since premeditation, as they were expressly charged, was essential to the existence of the crime of murder in the first degree.

The twenty-seventh instruction is as follows: "In this case as in all other criminal cases, the law provides that the defendant is a competent witness in his own behalf, and that his testimony is to be received and weighed by the jury as in the

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case of the testimony of any other witness, and if in this case the defendant has elected to testify in his own behalf, and, in so doing, he has testified to the commission of any other or different crime from the one here charged in the indictment, you will not, nor have you the right to, consider such testimony for the purpose of punishing him for the crime here charged, nor must you talk about it in your jury room for that purpose, but must wholly free your minds from any such thing, and not permit it to prejudice you, or bias your judgment against the cause of the defendant. But you may consider such evidence, if any there be in this case, in determining what credibility should be given to the defendant's testimony in this case." The defendant, at all events, has no just cause to complain of this instruction. In his testimony he confessed that he had committed the crime of burglary, and that was a circumstance affecting his credibility. The testimony of a confessed burglar is not so free from suspicion as that of men guiltless of crime. It has been the law in this State since 1852, that the conviction of an infamous crime may be proved against the credibility of a witness, and for hundreds of years it was the rule of the common law that the conviction of an infamous crime rendered a person incompetent to testify. The question is not, as it was in *Farley v. State*, 57 Ind. 331, what method of proving a conviction may be adopted, but the question is, what is the effect of the defendant's voluntary admission that he had committed a crime? The question in *Fletcher v. State*, 49 Ind. 124 (19 Am. R. 673), was not as to the effect of the admissions of a defendant that he had committed an infamous crime upon his credibility as a witness, but the question there was as to how far those admissions could be considered as tending to prove the crime for which he was on trial. It is evident, therefore, that neither of those cases is in point here.

We do not think that the thirty-first instruction given by the court is subject to the objections urged against it. If a

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man without provocation shoots another, and the shooting is not done in self-defence, and is accompanied by threats, it may, at least, be deemed murder in the second degree, and it is of such a killing that the instruction speaks. At all events the defendant has no just reason to complain of the instruction, for, if there is error in it, the error is to the prejudice of the State, and not of the defendant. *Murphy v. State*, 31 Ind. 511; *State v. Johnson*, 102 Ind. 247; 2 Bishop Crim. Law, section 680.

The language used in the instruction implies that the killing must have been purposely done, for it can not be reasonably supposed that a killing, "accompanied by threats," was accidentally done, and it was to such a killing that the minds of the jury were directed by the court. But, if this were not so, still, the instruction as applied to the evidence was correct, as there was no pretence that the shooting was accidental. The testimony of the defendant was that it was purposely done, but done in self-defence, so that there was no reason for the court to speak of an accidental shooting. Again, the instruction is to be considered in connection with those previously given, and they very clearly informed the jury that to constitute murder in the second degree the shooting must have been purposely and maliciously done. It is impossible, therefore, that the jury could have been misled, and unless it appears that they might have been misled to the prejudice of the accused, there can be no reversal. *Epps v. State*, 102 Ind. 539. The instruction does not, as did the instructions in *Brooks v. State*, 90 Ind. 428, and *Norton v. State*, 98 Ind. 347, attempt to state all the facts hypothetically, but states the general rule upon the subject of self-defence and adds, that, "If the defendant was in no danger of his life or of great bodily harm from the deceased at the time of the alleged killing, named in the indictment, and if from the situation, position and condition of the deceased, at that time, defendant had no reasonable grounds to believe and did not believe that he was in urgent and imminent danger of losing

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his life or suffering some great bodily harm at the hands of the deceased, and under the circumstances he shot and killed the deceased with a deadly weapon, at the time and place laid in the indictment (if you find these things hereinbefore set forth beyond a reasonable doubt), then and in that case the law will imply that such killing sprung rather from a bad and malignant heart, and if done without provocation, accompanied by threats, the law will imply that it was purposely and maliciously done."

The whole instruction proceeds upon the theory that the killing must have been done purposely, and the jury could not have understood it differently. This we say, because it lays down the law of self-defence, and this, of course, implies that the killing was not accidental, but was intentional. Taken as a whole, the instruction, although somewhat confused and obscure, can not be understood as speaking of anything else than an intentional shooting.

If there was no provocation for the shooting, and if it was, as the instruction hypothetically assumes, accompanied by threats, then the law will infer the existence of malice. In *State v. Johnson, supra*, it was said: "If an act is unlawful, and is of such a character as that the known or probable consequences of it would naturally be to produce serious bodily harm or endanger the life of the person against whom it was directed, the law would infer malice, and the crime would or might be murder."

The court did not err in directing the jury that mere words do not constitute such a provocation as will reduce an unlawful killing from murder to manslaughter. *Murphy v. State, supra*; 2 Bishop Crim. L., sections 700, 704.

The prosecuting attorney, in the course of his argument, said: "Will you believe this man, this person, who has told so many lies, and who has just seen the shadow of the gallows!" In so far as the statement of the prosecuting attorney criticises the testimony of the accused, it was proper, for he had testified as a witness, and had been contradicted upon many

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material points. An accused who voluntarily goes upon the witness stand is subject to the same criticism as any other witness, and it is not improper to assail in argument his credibility when he has been contradicted. *Thomas v. State*, 103 Ind. 419. All that can be said to be improper in the statement of the prosecuting attorney is the words "who has just seen the shadow of the gallows," and this we can not regard as a sufficient cause for reversal. It is a general, indefinite statement, and is not a comment upon a former verdict, for it does not in terms refer to any verdict, and it is, therefore, essentially different from a deliberate and direct comment upon a verdict rendered on a former trial. It is only where the misconduct in argument is of such a material character as makes it probable that it misled the jury, to the prejudice of the accused, that we can reverse. *Epps v. State*, *supra*; *Anderson v. State*, 104 Ind. 467; *Shular v. State*, *ante*, p. 289, and authorities cited; *People v. Hopt*, 9 Pacific Rep. 407.

It would be doing great injustice to the fairness and intelligence of the jury to assume that they were misled by such a general and fugitive remark as that of the prosecuting attorney in this instance.

We have given the evidence a careful examination, and find that it sustains the verdict upon every material point.

Judgment affirmed.

Filed March 4, 1886.

DISSENTING OPINION.

ZOLLARS, J.—The principal opinion holds that the dying declaration of Casey, that appellant had "no reason for the shooting," is competent evidence to go to the jury. To this holding I can not yield my assent.

I stated the grounds of my dissent at some length upon the former appeal. *Boyle v. State*, 97 Ind. 329. The gravity of the question, and the fact that it has been re-argued in the principal opinion, seem to render it proper that I should here state the grounds of my non-concurrence.

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On the 16th day of March, Casey identified appellant as the person who shot him. On the next day, in the absence of appellant, his dying declarations were taken. A part of those declarations, which was allowed to go to the jury over appellant's objection and exception, and which the principal opinion holds competent, is as follows:

"Question. What reason, if any, had the man you have so identified, for shooting you? Ans. Not any that I know of; he said he would shoot my damned heart out."

There are certain admitted facts in this case, and certain cardinal principles of the law, that should be kept steadily in view in this discussion.

The declarations in this case were taken in the absence of appellant, and hence he had no opportunity for a cross-examination. The most important agency in the elicitation of the truth in the trial of an issue is the cross-examination. A cross-examination may develop the truth, by refreshing the memory of an honest witness. It may show that the witness has used the wrong word to convey his meaning. It may show that what the witness states as a fact is but the expression of an inference or an opinion. It may show that the witness has suppressed facts, and told but a part of the truth. It may show that the witness is interested, prejudiced, biased and vindictive. The expectation of a cross-examination, doubtless, deters many dishonest witnesses, and keeps them nearer the truth. So important is the right to cross-examine adverse witnesses, that if the trial court should refuse it directly, or indirectly, by proceeding in the trial of a criminal charge in the absence of the accused, this court would unhesitatingly reverse a judgment of conviction.

That the accused shall have the opportunity to be confronted with his accusers, and cross-examine the witnesses against him, was thought to be of so much importance that the Fathers incorporated into the Constitution of the United States the provision that in all criminal prosecutions the ac-

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cused shall enjoy the right to be confronted with the witnesses against him.

It is also provided in the Constitution of this State, that in all criminal prosecutions the accused shall have the right to meet the witnesses face to face. R. S. 1881, sections 30, 58.

Nearly all, if not all, the State constitutions contain a like provision. And although we are far removed from the period when, in England, persons were falsely accused, tried without a jury, and without an opportunity to meet their accusers and the witnesses against them, yet, so jealous of the rights and liberties of the citizen have the people remained, that when the territories come, seeking admission into the Union as States, they come with constitutions declaring that the accused, in criminal prosecutions, shall have the opportunity to meet face to face the witnesses against them. Dying declarations constitute the only exception to the rule, that in all cases the accused shall have the opportunity to meet face to face, and to cross-examine adverse witnesses. Such declarations are admitted upon the single ground of necessity. The necessity rests primarily and principally upon the presumption, that in a majority of cases, there will be no equally satisfactory proof of the same fact. This presumption, and the probability of the crime going unpunished, are the chief grounds of this exception in the law of evidence. And although it is not now essential to the admissibility of such evidence that there should be no other proof of the same fact, yet, that there is such proof, as in this case, where there was an eye witness of the shooting, is a fact that should not be lost sight of, and surely should be a reason for keeping within proper limits the rule which admits dying declarations. It has been well said by a learned judge, that the great reason why dying declarations should not be received generally, as evidence, in all cases where the facts involved may thereafter come in question, seems to be, that it wants one of the most important and indispensable elements of testimony, that of an opportunity for cross-examination by the

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party against whom it is offered. 1 Greenl. Ev., section 156, note *a*; see, also, *Nelms v. State*, 13 Sm. & M. (Miss.) 500.

In the case of *Leiber v. Commonwealth*, 9 Bush (Ky.), 11, it was said: "The admission of dying declarations as evidence being in derogation of the general rule which subjects the testimony of witnesses as ordinarily received to the two important 'tests of truth,' an oath and a cross-examination, it is obvious that such evidence should be admitted only upon the grounds of necessity and public policy, and should be restricted to the act of killing, and the circumstances immediately attending it and forming a part of the *res gestæ*."

In the case of *Montgomery v. State*, 80 Ind. 338, this court quoted with approval the following from Mr. Starkey: "But so jealous is the law of any deviation from the general rule, that it confines the exception to the necessity of the case, and only renders such declarations admissible when they relate to the cause of death, and are tendered on a criminal charge respecting it." Because such evidence is an anomaly in the law, comes without the sifting of a cross-examination, and is liable to work injustice and injury to the accused, it has always been held that it must be zealously guarded and cautiously received. It is not under oath, but has been admitted upon the theory that the declarant making the statements, in the expectation of death, will be likely to tell the truth. Such evidence, doubtless, has a most potent influence with juries, because of the solemnity of the occasion under which it is rendered, and yet the truth is, that in many, if not in most cases, it is the weakest kind of evidence when looked at aside from mere sentiment.

The dying man is not allowed to make his statements until those about him think that he is near the end, and he sees, or thinks he sees, the shadows of death settling about him. Under such circumstances, and at such a moment, if he is a believer in personal responsibility and a future state, the mind will be centered upon and more concerned about that near future than about the things that are receding from view.

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And hence statements made under such circumstances, as to how the injury was received, etc., come with that infirmity that always attends inattention. Especially will this be so if those statements embody what must have been the result of a process of reasoning, as an inference, conclusion or opinion. It often happens, too, that in such an extremity the mind is not in its full vigor. The memory may have been confused and the reason blunted from physical suffering or mental anxiety. In such a condition the mind yields ready assent to what may be suggested, and the person states as a fact what is in truth a conclusion or an opinion, which would clearly appear to be erroneous, were the facts stated upon which they are based. And if facts are stated, it may be that but a part are stated, the most important being omitted. It has happened that a dying declaration made one day is contradicted by a different statement upon a subsequent day. *Moore v. State*, 12 Ala. 764.

Persons fatally wounded in a personal collision rarely ever think that they were in the wrong, although in fact they may have been, and hence they go to their death believing and declaring that they were assaulted and injured without any reason. However depraved a person may be, there is yet an unwillingness to be thought to have been in the wrong, and hence there is an inclination to so warp and color statements that surviving friends, at least, shall believe in the innocence of the dead.

It is a fact, too, that the expectation of death does not always make a good man of a bad one, nor a truthful man of a reckless one. Many have gone to their death with vengeance in their hearts and curses upon their lips.

The cases are many, where guilty murderers have stood upon the gallows, and with their dying breath asseverated their innocence. Generally, persons injured in personal collisions are not of the most blameless character. As a rule, doubtless they are the reverse. Not unfrequently they are persons who have no regard for others' rights, and regard not the

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law, except as they fear it. When the fear of prosecution for perjury is removed, they have no incentive for truth, even in the face of death.

Mr. Roscoe says: "Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state; especially when it is considered, that they can not be subjected to the power of cross-examination; a power quite as necessary for securing the truth as the religious obligation of an oath can be. The security, also, which courts of justice have in ordinary cases for enforcing truth, by the terror of punishment and the penalties of perjury, can not exist in this case." Roscoe Crim. Ev., p. 35.

Mr. Greenleaf says: "Yet it is always to be recollected that the accused has not the *power of cross-examination*,—a power quite as essential to the eliciting of all the truth, as the obligation of an oath can be; and that where the witness has not a deep and strong sense of accountability to his maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn." 1 Greenl. Ev., section 162. See, also, 1 Phillipps Ev., annotated by Cowen & Hill, 300; *People v. Sanchez*, 24 Cal. 17.

Indeed, law-writers and judges universally place the admission of dying declarations upon the ground of necessity, and strongly enjoin the duty of carefully limiting and cautiously receiving such evidence. Such has been the settled rule and practice of this court. *Morgan v. State*, 31 Ind. 193; *Binns v. State*, 46 Ind. 311; *Montgomery v. State*, *supra*.

Another rule of the law is, that no question to or answer by the dying man is competent, unless such question might be propounded to, and such answer might be made by, a witness upon the stand.

Another rule of law closely related to the above is, that such declarations must be of facts, and not of opinions, be-

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lief, conclusions, or inferences from facts. *Binns v. State*, *supra*; *Montgomery v. State*, *supra*; 1 Greenl. Ev., section 159; Roscoe Crim. Ev. 32; Wharton Hom., section 765, and cases there cited; Wharton Crim. Ev., sec. 294, and cases there cited; *Warren v. State*, 35 Am. R. 745; 1 Taylor Law of Ev., p. 644.

These rules too should be strictly guarded and enforced. If there is to be any laxity either way, it would seem that more latitude should be allowed in the examination of the witness upon the stand, because, there, the accused has an opportunity by cross-examination to sift and separate the facts from conclusions, and to thus show that what is stated as a fact is but a conclusion, inference or opinion, without sufficient facts upon which to rest.

In the case of *Shaw v. People*, 3 Hun (N. Y.) 272, it was said: "It is even more important to exclude an opinion, declared *in articulo mortis*, than in an ordinary case, where the witness may be subjected to a cross-examination," etc.

I have said this much in order to show how important and necessary it is to exercise great caution in the admission of dying declarations in evidence against the accused, who has no opportunity for a cross-examination.

In the case before us, it appears from the evidence that appellant and Casey, a short time before the shooting, had been engaged in a robbery in Ohio. This is the only information we have as to their character, except that appellant testified that Casey told him of his reckless, desperate and wicked life. Certain it is, that there is nothing in the evidence to inspire much confidence in the honesty and truthfulness of Casey, even though he spoke with the expectation of death. I submit, therefore, that this calls for additional caution in receiving his statements in evidence.

It may be too, that appellant is just where he ought to be, but that is not all there is of the question before us. The rule that we here establish is to be the rule that shall apply

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in all cases, no matter how wicked and depraved the slain, nor how upright may be the accused.

It must be kept steadily and prominently in view that appellant admits the shooting, and defends upon the sole ground that he had a "reason" or "cause" for so doing. In other words, his defence is that the shooting was justifiable because done in self-defence. If he had a reason or cause that would render the shooting justifiable, he is not guilty of murder. If he had no real reason or cause, and had not reasonable ground to apprehend death or great bodily harm at the hands of Casey, he is guilty of murder. Whether or not appellant had such "reason" or "cause" as would render the shooting justifiable, was the one important and only question to be settled by the trial. That was the issue. There was none other. Upon that issue, and in negation, the dying declaration of Casey was admitted in evidence. That declaration was that appellant had no "reason" for the shooting that he, Casey, knew of. It is held in the principal opinion that this declaration is not the statement of a conclusion, nor of an opinion, but of a fact such as any witness may state from the witness stand over the objection of the accused. In support of this holding the following authorities are cited: *Wroe v. State*, 20 Ohio St. 460; *Roberts v. State*, 5 Texas App. 141; *Payne v. State*, 61 Miss. 161; *Rex v. Scaife*, 1 Moody & Rob. 551; *People v. Abbott*, 4 West Coast Rep. 132; *State v. Nettlebush*, 20 Iowa, 257; *Brotherton v. People*, 75 N. Y. 159; Whart. Crim. Ev., section 294.

The Ohio case, *supra*, upon which rest the Texas and Mississippi cases, is radically different from the case before us. Here, as I have said, the defence is self-defence, and hence the vital question, and the only question for trial, was, had appellant a "cause" or "reason" for the shooting? No such question was involved in the Ohio case. There the accused did not admit the shooting, and claim that he had a reason or cause for so doing. He denied the shooting. No one saw him do the shooting. Thus denying the shooting, he was not

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in a favorable position to complain of the dying declarations that in no way connected him with the crime. If, as he claimed, he did not do the shooting, of course there could be no question of self-defence, and no question, so far as he was concerned, as to whether or not there was a reason or cause for the shooting. The dying declarations admitted in evidence were, that he, the dying man, did not know who did the shooting; that "it was done without provocation on his part * * * ; that he had done nothing to provoke it." The accused was claiming nothing to the contrary, and hence the evidence was harmless as to him, and of no practical importance in the case. The summary way in which the question was disposed of by the court indicates that the evidence was not regarded as being of much importance in the case. The following is the whole of the discussion by the court: "The declaration of the deceased, in speaking of the fatal wound, that 'it was done without any provocation on his part,' is objected to as being mere matter of opinion. Whether there was provocation or not, is a fact not stated, it is true, in the most elementary form of which it is susceptible, but sufficiently so to be admissible as evidence. In *Rex v. Scaife*, the declaration of the deceased was: 'I don't think he would have struck me if I had not provoked him.' This was received to prove the fact of provocation on the part of the deceased. 1 Moody & Rob. 551."

It should be observed, too, that the declaration in the Ohio case, that the shooting was done without provocation on the part of the deceased, was accompanied with the statement that he had done nothing; so that, taking the statements together, they are somewhat in the nature of a conclusion, accompanied with the facts upon which the conclusion is based. If the question of "provocation" had been the one vital question in the case, then I say, without hesitation, that it would not have been competent for the dying man to dispose of the whole case by stating that there was no provocation. I shall endeavor hereafter to state my reasons for so saying.

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In the case of *Rex v. Scaife*, 1 M. & R. 551, relied upon by the Ohio court, the declaration was: "I don't think he would have struck me if I had not provoked him." COLERIDGE, J., hesitated, but finally admitted the declaration upon the ground that it might have an influence on the amount of punishment. There was no discussion at all as to whether or not the declaration involved a conclusion. It will be observed that the declaration did not involve the one and vital question in the case, and that it was in favor of, and not against, the prisoner. The prisoner was not endangered by the want of an opportunity to cross-examine the dying witness, because the declaration was in his favor. In speaking of this declaration, the Kentucky Court of Appeals, in the case of *Haney v. Commonwealth*, 5 Crim. L. Mag. 47, said, that it was the expression of an opinion, but was admissible because in favor of the accused. The Ohio court cites it as being the statement of a fact. It was held in the Kentucky case above, as stated in the syllabus, that "The general rule that declarations of the deceased are admissible only when they relate to facts and not to mere matters of opinion, is subject to the exception that declarations of the mere opinion of deceased are admissible where they are favorable to the accused, and explain the conduct or motives of deceased." In speaking of such declarations in favor of the accused, the court said, amongst other things, "The admission of such declarations can do no harm. Frauds can not be practiced under cover of the rule. And there is not so much danger of misconception or perjury as where the declarant speaks from hostile feelings, surrounded by sympathizing friends, ready to construe his words as favorable to their own views, as may reasonably be done."

In the Texas case, there was no question before the court, because the declarations were admitted without any objection. It was so stated by the court, and it was held that, for that reason, the judgment could not be reversed because of their admission in evidence. It should be observed too, that

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while the declarations by the dying man contained a statement that the accused killed him for nothing, he also stated, apparently, all of the facts upon which the general statement was based. It will appear hereafter, that this makes a very material difference between that case and this, and a very material difference in the application of the rule admitting dying declarations. After stating the rule that declarations *in articulo mortis* must be of facts, and not matter of opinion, the court cited the Ohio case as having held that the statement that the wound was inflicted without provocation, was competent. This is the extent of the indorsement of the Ohio case.

In the Mississippi case the declaration was that the accused did the shooting without cause. The following is the whole of the discussion by the court: "Such declarations are admissible only as to the circumstances of the killing and are restricted to a statement of facts, and opinions and inferences are to be excluded, but the dying declaration admitted in this case was of a fact and not an opinion or inference of the declarant. It was that the defendant shot him without cause. It was not error to admit this declaration. *Wroe v. State*, 20 Ohio St. 460."

This case rests wholly upon the Ohio case, and without any discussion whatever really goes beyond that case. I shall speak of this case hereafter.

In the case of *People v. Abbott*, *supra*, the dying man recognized the accused as the man who cut him with a knife, and stated that "he had no cause for it whatever." The court considered the question as to whether or not the declaration was made *in articulo mortis*, but there was no decision, nor was there any discussion by court or counsel as to whether or not the declaration was a statement of a fact, or a conclusion or opinion. Indeed, there was no occasion for discussion or decision upon that question, because the declarations were made in the *presence* of the accused, who neither denied them nor propounded a question. The declarations thus became

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competent evidence against the accused as *quasi* admissions upon his part.

In the Iowa case, the declaration was that the shooting by the accused was intentional. It is not made certain, but there is room for a strong inference that the declaration was made in the presence of the accused. However that may be, the declaration was admitted without objection, and there was no decision, discussion or statement by the court as to whether or not the declaration was the statement of a fact or a conclusion or opinion. In the opening of the opinion it is stated by the court that the only question for decision was as to whether or not the evidence in the case was sufficient to sustain the verdict. If the declaration had been held competent, it would have brought the case in collision with the cases holding that the state of feeling between the parties can not be stated in a dying declaration. *Reynolds v. State*, 68 Ala. 502. A witness would not be allowed to state from the stand that the shooting was intentional, any more than he would be allowed to state the purpose of an act. *Montgomery v. State*, 80 Ind. 338.

There is nothing in the New York case except the declaration of the dying man, identifying the accused as the man who shot him. It will appear further along that such evidence, although the expression of an opinion, is competent, from the necessity of the case, it being impossible for the witness to put in language the grounds and means of such knowledge. That, however, is not at all the case before us.

In section 294, Wharton Crim. Ev., cited, the rule is stated broadly, that dying declarations must be of facts, and not of opinion or belief, and in referring to the Ohio and Texas cases it is stated, "it has been held," etc.

It must be apparent from this examination of the authorities relied upon in the principal opinion, that the only one directly in point is the Mississippi case, which rests upon the Ohio case; that, to some extent, supports the principal opinion. As has been seen, the Kentucky Court of Appeals, in the case

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of *Haney v. Commonwealth, supra*, has taken the prop from under the Ohio case, by holding that the declaration in the case of *Rex v. Scaife, supra*, was the statement of an opinion, and not the statement of a fact.

The Ohio case, and those based upon it, are squarely met by the case of *Collins v. Commonwealth*, 12 Bush (Ky.), 271. The dying declarations in that case were, "that Michael Collins killed me, and killed me for nothing." The court, LINDSAY, C. J., delivering the opinion, after holding that dying declarations are admitted on the ground of necessity, said: "In this case it was unnecessary to prove the declarations of the deceased to establish the fact that the killing was done by the accused. That fact was abundantly proved by several uncontradicted witnesses, and was virtually admitted by the line of defence adopted. The statement that Collins killed the deceased 'for nothing' was but the expression of an opinion, and was clearly inadmissible."

In the case of *McPherson v. State*, 22 Ga. 478, the dying declaration was, that the declarant did not believe that the accused intended to hurt him. This was held not competent, even in favor of the prisoner, because not the statement of a fact.

In the case of *People v. Wasson*, 3 W. C. Rep. 642, the dying declaration was, "I think that this man, Henry Wasson (the defendant), is the man that shot me." This was held to be the expression of an opinion, and hence not admissible.

Many similar cases might be cited, not all of which are directly in point, upon the specific declaration under discussion, but all laying down the general rule, which is, as I contend, in conflict with the Ohio and Mississippi cases. These cases, it seems to me, if regarded as adjudications, are illogical, and opposed to reason and the weight of authority. They involve a *petitio principii*. Without argument, the very point in dispute is at once assumed by holding that the declaration is the statement of a fact. Whether appellant had a "reason" or "cause" for the shooting is, in some sense, a

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fact, but it is not a fact that a witness may state. It is the ultimate fact to be found from all the facts and circumstances attending the killing. If a fact, in any sense, it is the ultimate fact, which, in this case, settles the guilt or innocence of appellant. If a fact at all, it is an inferential fact, depending upon other and primary facts. No person, not present, could say that there was no "reason" or "cause" for the shooting. Why? Because he would have no knowledge of the facts and circumstances attending the shooting. A knowledge of these facts is absolutely essential to such a statement. How then is such a conclusion and statement to be arrived at? Clearly, the witness must take the facts and circumstances, weigh them, reason about them, and by this process arrive at a conclusion. The conclusion that there was no "reason" or "cause," is the result of mental process, and can be arrived at in no other way. It can not be settled by the physical senses. It can neither be seen, heard, nor felt, but must be the result of reasoning from other facts. If so, clearly the result of such mental process is not, in the common and legal sense, a fact. It is a conclusion based upon facts. A fact, primarily, is an "act, an incident, a circumstance." Worcester's Dictionary. The latin word is *factum*, from *facere*, to make, to do. Webster defines a fact as "an act, event," and gives as synonyms "act, deed, performance, event, incident, occurrence, circumstance." Bouvier defines a fact as "an action, a thing done, a circumstance."

Whether or not upon the facts and circumstances attending the shooting, the conclusion shall be reached that appellant had, or had not, a "reason" or "cause" for the shooting, will depend upon the moral sense, the reasoning faculties, and the preconceived notions of the witness upon the question of self-defence. All persons do not reason alike, and do not come to the same conclusion from the same given facts. Upon the facts and circumstances of the case, one may conclude that appellant had ample reason for the shooting in the manner

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and at the time he did. Upon the same facts and circumstances, another may conclude that he had no reason at all.

This is amply illustrated by the numerous cases where dying men have made declarations, and at the same time given such facts as to show that the declarations were inferences, conclusions and opinions. And these cases show, too, how very dangerous it is to admit such declarations when they embody anything more than primary facts; and how hazardous it is to hold as the statement of facts declarations which may be but the result of inferences and conclusions from facts not stated.

In the case of *Binns v. State*, 46 Ind. 311, the dying declaration by the woman was that it was her husband, the defendant, who shot her. If she had stopped with that, the declaration, perhaps, would have been called the statement of a fact, would have gone to the jury, and, probably, procured a conviction. It was further developed by her statements, however, that she was shot through a window; that she did not see the person who shot her, but based her statement upon the fact that the husband had threatened to shoot her through the window. These latter statements showed that the declaration was but the statement of an opinion, and hence was held by this court to be incompetent.

So, in the case of *Warren v. State*, 9 Tex. App. 619 (35 Am. R. 745), the dying man said: "I know Geo. Warren shot me." If he had stopped there, it might, perhaps, be said that he but stated a fact; but he added, "for he threatened me." This showed that the former part of the declaration was but an opinion, and hence incompetent.

So, in the case of *Shaw v. People*, 3 Hun (N. Y.) 272, already cited (S. C., *People v. Shaw*, 63 N. Y. 36), the woman who was dying from the effects of poison, said: "Charles" (her husband) "and the Briggs woman was the cause of all this suffering, the cause of all this." Here was an unqualified, emphatic statement. In a subsequent statement to an-

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other person she said that she "*expected* it was Charles and Mrs. Briggs."

Many such cases might be cited, and, as I have said, they all show the necessity of requiring the primary facts.

In the case before us, there were facts and circumstances connected with the shooting, and these Casey must have had in mind when he declared that there was no "reason" or "cause," or else he stated his opinion without any reference at all to the facts and circumstances which must be known before any one could say that there was no "reason" or "cause" for the shooting. As I have said, the one vital question in the case was, had appellant a reason or cause for the shooting? That was the ultimate fact to be settled. How shall it be settled? Shall the whole question be disposed of by the dying declaration, or shall the jury, who are the triers of the facts, determine as to whether or not there was a "reason" or "cause"? How shall the jury get at the facts? Shall they perform the mental process, make the inference, and form their opinion from the facts and circumstances attending the shooting, or shall that be done for them by the witnesses—in this case by the dying man? Shall he give to the jury the facts and circumstances, or shall he keep them to himself, and give to them the ultimate fact that he has inferred from the facts and circumstances, his opinion upon those facts and circumstances? Could the jury have the facts and circumstances, they might readily disagree with him as to the existence of a "reason" or "cause" for the shooting. Had he stated the facts and circumstances, it might readily have appeared to the court that the declaration was but an opinion without sufficient facts upon which to rest.

It is stated in the principal opinion that such a conclusion (the declaration) "is not the expression of an opinion, but is the statement of a conclusion of fact, from observed facts, which, under all the authorities, is competent." I can not concur in this, either as a general proposition of law or as applied to this case.

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My understanding of the law is, that in no case is it competent for a witness to state an inference or conclusion from facts, where it is possible to give the facts to the jury. A non-expert witness may, in some cases, express an inference or opinion, but the uniform holding of this court has been, and I understand it to be the rule everywhere, that he can not express an opinion until he has first, so far as it is possible, stated the facts upon which the opinion is based. That a non-expert witness may give an opinion at all, is the rule of necessity, and outside of the general rule. When the case is one in which all the facts can be presented to the jury, then no opinion can be given, because the jury are as well qualified as the witness to form a conclusion.

In the case of *Evansville, etc., R. R. Co. v. Fitzpatrick*, 10 Ind. 120, it was said: "As a general rule, witnesses are only permitted to state facts, such as are within their own personal knowledge. Opinions, beliefs and *deductions*, must be confined to the tribunal whose duty it is to decide upon questions of fact."

In the case of *Loshbaugh v. Birdsell*, 90 Ind. 466, it was held that a witness can not give his opinion that a highway will or will not be of public utility. It was said: "There was no difficulty in putting the jury in possession of all the facts pertinent to this inquiry, and they are supposed to be as well qualified to form an opinion from the facts as the witnesses themselves. * * * The admission of these opinions also seems to trench upon the rule that witnesses can not usurp the province of the jury, which they would do were they allowed to express opinions upon the very issue upon trial."

In the case of *Yost v. Conroy*, 92 Ind. 464, it was held that the opinion of a witness as to the public utility of a ditch, and the amount of damages it may cause to lands, is not proper evidence. It was said: "To hold otherwise would put the witnesses in the place of the jurors, and commit to

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them the decision of the amount of recovery. A contrary doctrine would also violate the rule that witnesses can not express an opinion upon the precise point which the issues present for the decision of the jury."

There are cases where the witness can not put before the jury, in an intelligible and comprehensible form, the whole ground of his judgment or opinion. In such cases, after the witness has stated all the facts that it is possible to state, he may, from the necessity of the case, give an opinion.

When questions as to the condition of the mind and body are the questions in issue, there are often many things in the acts, deportment and appearance of the party which create a fixed and reliable judgment in the mind of the observer, that can not be conveyed in words to the jury. That a person appears to be sick, sad or intoxicated, may well be known by observation, and yet there is no way to describe the appearance except by the words that necessarily embody the conclusion reached by observation. And so, a witness may know a person, and yet he can not convey to the jury in words how he knows him. In such cases, the rule of necessity allows the witness to give an opinion, for it is nothing but an opinion as to the identity of the person. *Carthage T. P. Co. v. Andrews*, 102 Ind. 138 (142). This is the doctrine laid down in the cases of *Yost v. Conroy*, *supra*, and *Bennett v. Meehan*, 83 Ind. 566, cited in the principal opinion.

In the case of *State v. Williams*, 67 N. C. 12, after holding that statements of personal identity are opinions, admitted from necessity, that there must be a limit to the admission of opinions, and that the witness can not substitute his judgment for that of the tribunal to whom the law has committed the decision of the fact, it was said: "We think the limit may be drawn without any difficulty, and consistently with the habitual practice of courts. Whenever the opinion of the witness upon such a question, or on one coming under the same rule, is the *direct* result of observation through his senses, the evidence is admitted. * * * But if the opinion

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of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. * * * In such a case the tribunal is as competent to reason out the resultant opinion as the witness is; and by the theory of law, it alone is competent to do so. To allow any influence to the opinion of the witness would be *unnecessarily* to substitute him to the function of the tribunal." See, also, *Ferguson v. Hubbell*, 97 N. Y. 507 (49 Am. R. 544); *Bissell v. Wert*, 35 Ind. 54.

To say that Casey's declaration was "the statement of a conclusion of fact from observed facts," does not help the case. It was not for him to draw conclusions from the facts, and state them instead of the facts. It was the province of the jury to draw the conclusions, and to do that, the facts, and not the conclusions, should have been stated by Casey. A conclusion from facts by a witness, in my judgment, is nothing more nor less than an opinion upon those facts. The witness must know the facts, weigh them, and reason about them, and whether he says after this, I conclude that there was no reason for the shooting, or in my opinion there was no reason for the shooting, is all the same. The mental process by which the conclusion is reached is the same, and the result is the same however it may be declared.

Dying declarations, of course, must be limited and confined to the circumstances forming a part of the *res gestæ*. They can not relate to what preceded, nor to what followed the shooting, unless so close in time and connection as to be a part of the *res gestæ*. *Montgomery v. State*, *supra*. Now, what did or what could have occurred in connection with the shooting, that Casey could not have related? Is it possible that there was anything that he could not have related, which in any proper way could have produced, or contributed in producing, the conclusion or opinion that appellant had no reason for the shooting? Was there anything, could there have been anything, connected with the shooting to create the necessity for admitting the conclusion or opinion of Casey instead of, and unaccompanied by, the facts? What was done

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and what was said, could easily have been related. I can imagine nothing else upon which Casey could rest a conclusion that there was no reason for the shooting. If there was no disagreement, and no angry words, he could have so stated. If he made no assault and no threats, he could have so stated. If Casey had made the statement as a witness upon the stand, every fact upon which he based his conclusion could have been developed by a cross-examination. If so, the facts, and not the conclusions, should have been given in the declaration. Surely, if a witness can state all the facts which determine the question of the public utility of a highway, the facts which will determine whether or not appellant had a reason for the shooting can be stated. And if a witness may not give his opinion as to whether or not a highway will be of public utility, surely he should not be allowed to give his opinion in a case like this, involving life and liberty, and where there is no opportunity for a cross-examination.

When Casey declared there was no reason, in answer to the question put to him, he went beyond the *res gestæ*, and covered everything that might have operated as a reason, whether immediately connected with the shooting or preceding it.

It is further stated in the principal opinion that the declaration was the statement of a negative fact, and that negative facts can only be proven by a denial. I respectfully submit that this assumes the point in controversy. A negative fact, it may be, can be proven by a denial; but a negative conclusion can not. There are many conclusions that might as well be called negative facts as the declaration under discussion. For example, a person's real estate is assessed as benefited by the construction of a drain, or the opening or repairing of a street. He claims that it is not benefited at all. The other party claims that it is. Whether or not it is benefited, and if so, how much, are questions to be settled by the trial. That it is not, is the negative which the owner seeks to establish. The other party can not have his witnesses state how much it is benefited. *Yost v. Conroy, supra.*

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And where the issue is benefit or no benefit, such witnesses can not state that the lands are benefited. It seems to me that it must be equally clear that the owner can not, on the plea that he wishes to prove a negative fact, have his witnesses testify that it is not benefited at all, because that must be a conclusion, dependent upon primary facts. The facts, and not the conclusion, should be given to the jury.

The principal opinion distinguishes between the existence of a reason and the existence of a sufficient or insufficient reason, and holds that a witness may state that there was no reason, because he thereby but states a fact, and that he can not state that there was a sufficient or insufficient reason, because he would thereby express an opinion. In my judgment, the difference is in degree and not in quality. In either case, the witness must reason from the primary facts. If he says there was no reason, he expresses a conclusion and opinion. If he says there was no sufficient reason, he expresses a double conclusion and opinion; one as to the existence and the other as to the sufficiency of the reason. The declaration that appellant "had no reason that I know of," I submit, shows upon its face that Casey was not stating a fact, but an opinion. And for such an opinion a witness could not be convicted upon the charge of perjury, however unfounded it might be, because it is not the statement of a fact. *Commonwealth v. Brady*, 5 Gray, 78. Finally, I think I am supported in my conclusion in this case, by the case of *Montgomery v. State*, 80 Ind. 338, already cited. In that case death resulted from an attempt to produce an abortion. It was held that the death was the subject of inquiry, and that hence it was a case for the admission of dying declarations. The dying declaration was that "the operation was performed for the purpose of producing an abortion." It was held that this declaration should have been excluded. It was said: "What the purpose of an act was is an inference from facts, and witnesses must state the facts, and not their conclusions. A witness would have been required to state

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what was said and done. Facts are to be stated by witnesses; inferences to be made by the jury. This rule should be applied with jealous care to dying declarations. As the accused can not cross-examine, there are no means of testing the correctness of the conclusion. It may be entirely without any foundation in fact. But we need not discuss this question, for it is well settled that dying declarations must speak to facts only, and not to mere matters of opinion." I submit that the declaration in that case comes as near being the statement of a fact as the declaration in this case. The mental process necessary to reach the conclusion in that case would be less complicated than that required to reach the conclusion declared by Casey. In this case as in that, it was improper for the declarant to state inferences from facts. In this case as in that, the declarant should have stated what was done and said. In this case as in that, facts were to be stated by the witness, and inferences to be made by the jury. In this case as in that, the conclusion by the declarant may be entirely without foundation.

The cases are not in all respects the same, but in my judgment, I am right here, or the reasoning there is unsound. I think that I am correct in my position in this case, and that the reasoning there is sound, and supported by authority everywhere.

MITCHELL, J., concurs in the dissenting opinion.

Filed March 4, 1886.

 No. 12,403.

RUSSELL v. CLEARY ET AL.

EXEMPTION FROM EXECUTION.—*Malicious Prosecution.—Judgment for Costs.*

—Where a judgment for costs is rendered against the plaintiff in an action for malicious prosecution, he is not, as to such judgment, entitled to

106	502
126	126
105	502
130	98
105	502
134	528
106	502
137	112
105	509
140	142

105	502
180	475
180	477

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claim the exemption from execution provided by section 703, R. S. 1881.

EXECUTION.—Injunction.—Tender.—Where an execution has been issued on a judgment which is right as to a part of its amount, the execution defendant can not enjoin the collection of the execution until he has first paid or tendered the part which is right.

From the Vigo Superior Court.

S. C. Stimson and R. B. Stimson, for appellant.

B. E. Rhoads and E. F. Williams, for appellees.

Howk, J.—Errors are assigned here by appellant Russell, the plaintiff below, upon the decisions of the superior court, (1) in sustaining the separate demurrers of appellee Stephen Hedges to each of the first and second paragraphs of complaint, and (2) in overruling his motion for a new trial.

In the first paragraph of his complaint, appellant alleged that, on the 19th day of May, 1882, he was plaintiff in an action then pending in the superior court of Vigo county, against appellee Hedges, for malicious prosecution; and that, on the day last named, appellant dismissed his aforesaid action for malicious prosecution, and the costs therein were taxed against him in the sum of \$56.90; that afterwards, on November 24th, 1883, appellee Hedges caused an execution to be issued against appellant for the collection of such costs, and placed such execution in the hands of appellee Cleary, sheriff of Vigo county, who proceeded to levy the same upon appellant's property; that appellant was then and since a householder of the State of Indiana, and, as such, demanded the benefit of exemption from execution, and delivered to such sheriff, at the time of making such demand, a full, true and complete schedule and inventory of all his property of every name and description, in due form of law, and verified by appellant's affidavit; that appellee Cleary, by Hedges' direction, in disregard of such demand and schedule, levied upon and was proceeding to sell appellant's property, and refused to set off to appellant any property as exempt from execution, to his irreparable injury; that all of

appellant's property was worth less than \$600, and should all be set off to him as free from execution; that the appellees, after appellant had demanded exemption of his property at the hands of sheriff Cleary, and had delivered to him such schedule and inventory, unlawfully entered appellant's house and levied upon and seized his household goods, and his wife being then and there sick was so disturbed, excited and frightened by such unlawful doings of appellees, that her malady was greatly aggravated; and appellant averred that he had been damaged, by such unlawful doings of appellees in the sum of \$600. Wherefore appellant prayed that appellees be restrained from selling such property, and that the execution of such judgment be enjoined, and for \$500 damages, etc.

In section 703, R. S. 1881, in force since May 31st, 1879, which section, except as to the amount of the exemption, is substantially a re-enactment of section 1 of "An act to exempt property from sale in certain cases," approved February 17th, 1852, it is provided as follows:

"An amount of property not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act."

In construing the provisions of this section of the statute, it has been uniformly held by this court, that, under such provisions, property can only be claimed by a resident householder, as exempt from sale on execution, where the judgment has been rendered in an action upon a cause of action growing out of or founded upon a contract express or implied. *State, ex rel., v. Melogue*, 9 Ind. 196; *Thompson v. Ross*, 87 Ind. 156; *State, ex rel., v. McIntosh*, 100 Ind. 439.

In the case in hand, it will be seen from the summary of the first paragraph of complaint heretofore given, that the judgment for costs against the appellant, and as to which he claimed an exemption of his property from sale on an exe-

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cution issued thereon, was rendered in an action, not upon contract express or implied, but to recover damages for a malicious prosecution, and sounding in tort. In *Nowling v. McIntosh*, 89 Ind. 593, in speaking of a complaint similar, in some respects, to the complaint now under consideration, the court said: "There was no error in sustaining the demurrer to the complaint in this suit. It was insufficient because exemption exists only in actions upon contract, and because it claimed exemption on a judgment obtained in an action sounding in tort. *Boesker v. Pickett*, 81 Ind. 554; *Keller v. McMahan*, 77 Ind. 62."

We held substantially in *Church v. Hay*, 93 Ind. 323, that the costs recovered by the plaintiff, in a suit for tort, being an incident of the judgment for his damages, are collectible on execution as the damages are collectible; the judgment is an entirety, and no property is exempt from the execution thereon, either for the damages or for the costs. In *State, ex rel., v. McIntosh*, *supra*, there was a judgment for costs against the plaintiff's relator, Wingler, rendered in a special proceeding, not founded upon contract nor sounding in tort. An execution issued on such judgment was levied by McIntosh, sheriff, on the property of Wingler, and he demanded that such property should be set apart to him as exempt from sale on such execution. The sheriff refused to comply with such demand, and Wingler filed his complaint for a mandate to compel sheriff McIntosh to comply with his demand for the exemption of his property from sale on such execution. McIntosh's demurrer to this complaint was sustained by the circuit court, and Wingler appealed to this court. In affirming the judgment below, we held, in substance, and correctly so, we think, that costs are not a matter of contract, but are given or withheld by statute; and that where an execution is issued upon a judgment for costs, and it does not appear that such costs were incident to any debt founded upon a contract, express or implied, the execu-

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tion defendant, though a resident householder, can not claim any of his property as exempt from sale on such execution.

In the case under consideration, we are of opinion that no error was committed by the superior court in sustaining the demurrer to the first paragraph of appellant's complaint. *Berry v. Nichols*, 96 Ind. 287.

In the second paragraph of his complaint, appellant asks a court of equity to enjoin the appellees from collecting the aforesaid execution against him, issued on such judgment for costs, upon the ground that appellee Hedges could only recover judgment for the costs made by himself, in the action for malicious prosecution, namely, the sum of \$40; and that, as the execution was issued for the sum of \$56.90, the aggregate costs of both parties, appellant as well as appellees, it was erroneous as to the excess over \$40, namely, \$16.90, and appellant was entitled to an injunction against such execution. If appellant had paid or tendered, before he commenced this suit, the judgment against him for \$40 costs, it is possible that he might have an injunction against the execution as to the residue, to wit, \$16.90 of such costs, though this point we need not and do not decide. What we do decide is that where an execution has been issued on a judgment, which is confessedly right as to a part of its amount, the execution defendant can not enjoin the collection of such execution, until he has first paid or tendered that part thereof, which it admitted to be right. In such a case, the familiar rule is applicable that a suitor, who seeks equitable relief, must affirmatively show in his complaint that he has first offered to do equity; otherwise, he can have no standing in a court of equity. *McWhinney v. Brinker*, 64 Ind. 360; *Lancaster v. DuHadway*, 97 Ind. 565; *Rowe v. Peabody*, 102 Ind. 198.

The demurrer to the second paragraph of complaint was correctly sustained.

We must decline to consider the only question sought to be presented under the alleged error of the court, in over-

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ruling the motion for a new trial. There is nothing in the question. There is no error in the record of which the appellant can complain.

The judgment is affirmed, with costs.

Filed March 4, 1886.

No. 11,860.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. KOONS.

105	507
139	94
105	507
158	29

CONTRACT.—Judgment.—Merger.—A party can not present by piecemeal, in successive actions, claims which grow out of an indivisible, entire contract, and the judgment in the first action brought is a conclusive merger of all amounts due under or arising out of the contract prior to the bringing of such action.

SAME.—Only One Action for Breach of Entire Contract.—Where a contract, upon an entire consideration, stipulates for the performance of several acts in favor of the same person, at the same time, it is entire, and separate suits can not be maintained to recover for the failure to perform each several act.

SAME.—Former Adjudication.—Railroad.—Damages.—Dismissal.—Where, in consideration of the conveyance of a right of way, a railroad company contracts with the land-owner to construct and maintain fences along such right of way and a crossing over the road, a judgment, in an action upon such contract, for damages for a failure on the part of the company to construct the crossing, is a bar to an action for a failure to construct the fences, although in the former action the plaintiff expressly dismissed and withdrew from the jury all claim for damages relating to the failure to construct the fences.

From the Henry Circuit Court.

C. W. Fairbanks and *O. Gresham*, for appellant.

C. S. Hernly and *S. H. Brown*, for appellee.

MITCHELL, J.—On the 31st day of January, 1882, the Indiana, Bloomington and Western Railway Company and Davault Koons entered into a written contract, in which it

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was recited that in consideration that Koons had conveyed to the railway company a right of way over certain lands owned by him, the latter agreed to maintain fences along the right of way so conveyed, and to construct and maintain a good and sufficient crossing over its road, with cattle-guards on each side.

This suit was brought upon the contract. It was assigned as a breach thereof, that the railway company failed to erect the fences according to the agreement, whereby the plaintiff sustained damage. It is alleged that the reasonable cost for the erection of the fences will be eight hundred dollars, and that the plaintiff has sustained special damage by reason of the failure of the defendant, in that he has been for two years prevented from using his tillable and pasture lands lying adjacent to the unfenced right of way.

The defence is predicated upon a former adjudication, whereby it is claimed the plaintiff's right of recovery on the contract is merged in a prior judgment.

The answers alleged, in substance, that on the 12th day of October, 1883, in the Henry Circuit Court, the plaintiff impleaded the defendant in a certain action on the same written agreement and cause of action, to which the defendant appeared, and that by the consideration and judgment of the court, on issues joined on a complaint on the same identical contract, the plaintiff recovered a judgment of forty dollars, which remains in full force, etc.

To these answers it was replied, in substance, that in the former action the breach in the contract sued on, relating to the failure of the defendant to erect the fences, was withdrawn from, and stricken out of, the complaint before the jury retired, and that the finding and judgment in that case related solely to the breach of the contract in failing to construct the crossing and cattle-guards stipulated for in the agreement.

A demurrer was overruled to this reply. Upon trial by a jury, a verdict was returned for the plaintiff. Over a motion for a new trial, judgment was rendered on the verdict.

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At the trial the defendant, in support of its special answers, offered in evidence the pleadings, record entries, and judgment in the former suit. Upon objection this evidence was rejected as immaterial and irrelevant. The following entry appeared on the record of the prior suit as it was offered in evidence: "Thereupon said plaintiff withdraws from the consideration of the jury and dismisses all claim for damages except for the breach of contract in failing to make crossing."

The question for determination is, was the judgment rendered in the prior action a bar, notwithstanding the dismissal of so much of the complaint as related to the claim for damages for the failure to build fences?

It was alleged in the complaint in the first action, that the railway company had built its railroad over the right of way conveyed to it by the plaintiff, and that it had been running its cars since the 1st day of February, 1882.

The railway company having, upon a consideration received by it, contracted to build the fences, and having taken possession of the land, it became its duty within a reasonable time to comply with its contract. The duty to build the fences, and to construct the crossing and cattle-guards, arose out of the same contract. The obligation of the railway company was to discharge both stipulations within a reasonable time. Failing to comply with its contract within a reasonable time, the plaintiff was entitled to maintain an action for a breach of the contract, and to recover as damages the reasonable cost of erecting the fences and constructing the crossing. It was not necessary that he should have first done the work which it was the duty of the railway company to do, before he could maintain the action. *Logansport, etc., R. W. Co. v. Wray*, 52 Ind. 578; *Lawton v. Fitchburg R. R. Co.*, 8 Cush. 230.

Having a right to recover for the failure to construct the crossing, the plaintiff had at the same time the right to recover on the same contract for the failure to build the fences. This being so, it was not competent for him, after recovering

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part of the damages accrued in one suit, to maintain another suit on the same contract to recover other damages which had accrued when the first judgment was rendered.

A party will not be permitted to present by piecemeal, in successive suits, claims which grow out of an indivisible, entire contract, and which might have been litigated and determined when the first suit was brought. In such a case, the judgment in the first suit will be a conclusive merger of all the plaintiff's rights under the contract.

The rule is well stated in the following language: "Where the action is upon a contract, it merges all amounts due under or arising out of the contract, prior to the suit. They constitute a single, indivisible demand. The plaintiff can not be allowed to split up the various covenants or promises contained in one contract, and to recover upon each separately." Freeman Judg., section 240; *Ibid.*, section 272.

In *Henderson v. Henderson*, 3 Hare Ch. 100, 115, the rule was stated as follows: "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

This salutary doctrine of the law is grounded upon principles which have become axiomatic, and which have often been applied by this court in cases involving claims arising out of contracts and for injury to property. *City of North Vernon v. Voegler*, 103 Ind. 314; *Richardson v. Eagle Machine Works*, 78 Ind. 422 (41 Am. R. 584); *Crosby v. Jeroloman*, 37 Ind. 264; *Ulrich v. Drischell*, 88 Ind. 354; *Ballard v. Franklin Life Ins. Co.*, 81 Ind. 239; *Green v. Glynn*, 71 Ind. 336; *Elwood v. Beymer*, 100 Ind. 504; *State, ex rel., v.*

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Krug, 94 Ind. 366; *Minor v. Hill*, 58 Ind. 176 (26 Am. R. 71); *Griffin v. Wallace*, 66 Ind. 410; *Bates v. Spooner*, 45 Ind. 489.

In *Richardson v. Eagle Machine Works*, *supra*, it was said: "The plaintiff having brought and prosecuted to final judgment one action for the defendant's breach of the contract sued on in this case, his remedy for that breach is exhausted. A party is not permitted to split up his cause of action and bring two suits for the same breach of a contract, where, as in this case, full damages might have been demanded and recovered in the first action."

This rule is applicable to all contracts which are entire and indivisible in their nature. Whether a contract is entire or not is to be determined by considering whether the obligation which it imposes is to be discharged at different times, or to different persons. If parties have stipulated in the same contract that a debt shall fall due in instalments, or that several distinct obligations which it imposes shall be performed at different times, at stipulated periods, or to different persons, the consideration for each separate act being either expressly or impliedly apportioned, they have thereby made the contract divisible in such a sense that an action may be maintained on the contract to recover upon each separate independent stipulation as it matures or is broken. In such a case, the presumption would be that all such claims under the contract as were matured, and which might have been included in the action, at the time it was commenced, were merged in the judgment. *Minor v. Hill*, *supra*. Whether it might be shown in such a case, that one or more of such claims as might have been included were withdrawn before judgment, we need not determine. When, however, a contract upon an entire consideration stipulates for the performance of several acts, in favor of the same person, at the same time, such a contract is entire, and separate suits can not be maintained to recover for its breach in respect to each several act stipulated to be performed. *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Logan v. Caffrey*, 30 Pa. St. 196; *Secor*

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v. *Sturgis*, 16 N. Y. 548; *Cromwell v. County of Sac*, 94 U. S. 351. Such claims constitute an entire and indivisible cause of action, and a judgment therein is a bar to any subsequent action founded on such claims. *O'Beirne v. Lloyd*, 43 N. Y. 248; *Beloit v. Morgan*, 7 Wall. 619; *Stein v. Steamboat Prairie Rose*, 17 Ohio St. 471; *Ewing v. McNairy*, 20 Ohio St. 315; *Dalton v. Bentley*, 15 Ill. 420; *Wells Res Adjudicata*, section 240, *et passim*.

The contract between the railway company and Koons was entire and indivisible. When any breach of it was made for non-performance, the breach was entire so far as it remained unperformed, and but one action could be maintained for such breach.

The withdrawal of a part of the claim in such a case before judgment can not preserve the right to bring another suit for the part so withdrawn. *Logan v. Caffrey, supra*; 2 Smith Leading Cases, 669.

The reasons for withdrawing the claim, which is made the foundation of the present action, from the consideration of the jury in the former suit, are not disclosed. Whatever may have induced the withdrawal, since the claim had then matured and arose out of an entire, indivisible contract, it can not now be made the subject of a separate, independent action. If the court erroneously rejected evidence which was offered in support of the claim, the appropriate remedy of the plaintiff was to secure a reversal of the ruling by appeal. Having allowed the case to proceed to judgment, the measure of his rights under the contract is determined by that judgment. The case is not within the ruling in *Block v. Ebner*, 54 Ind. 544.

The questions considered are presented by the assignments of error calling in question the ruling on the demurrer to the plaintiff's reply and in overruling the motion for a new trial.

For the error in these rulings the judgment is reversed, with costs.

Filed March 4, 1886.

 Holman v. The State.

No. 12,242.

HOLMAN v. THE STATE.

DIRECT CONTEMPT.—*What Constitutes.*—Disorderly conduct, insulting demeanor to the court, and a direct disobedience of its orders *in facie curiæ*, constitute a direct contempt.

SAME.—*Power to Punish.*—The power to punish for direct contempts is inherent in all courts of superior jurisdiction, and can not be created, destroyed or abridged by the Legislature.

SAME.—*Legislative Power to Require Judge to make Formal Charge.*—*Quære*, as to whether the Legislature has power to require the judge of a court of superior jurisdiction to make any formal or written charge of a direct contempt occurring in open court and in the presence of such judge.

SAME.—*Appeal.*—*Statement of Judge.*—In a proceeding for a direct contempt of court, where the matter takes place in the presence of the court, and the judge places in the record a statement of the occurrence as required by statute, the appellate court will accept such statement as true.

From the Fulton Circuit Court.

M. L. Essick and *E. Myers*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ELLIOTT, J.—This appeal is prosecuted from a judgment declaring the appellant guilty of a contempt. A statement was filed by the judge charging the appellant with a direct contempt, and from that statement we take these material facts: During the trial of a cause before a jury, the appellant, as counsel, propounded a question to a witness; to this question an objection was sustained; after this ruling was announced the appellant arose to his feet and insisted upon making an argument on the question ruled upon; the court requested him to sit down, as an argument was not then in order, but, as the statement recites, the appellant “peremptorily and in the most defiant manner declared that he would not obey the request of the court, and said, ‘I will stand here while it suits me to do so.’” The court again directed him to be seated; this direction was disobeyed, whereupon the

105	513
126	578
106	513
181	481
105	513
140	286
105	513
151	555
105	513
161	443

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sheriff was directed to remove the appellant to another part of the court-room. The sheriff obeyed this order, and while the appellant was passing in front of the judge's bench he said to the judge, "I will get even with you." A counter statement was filed by the appellant, giving a somewhat different version of the matter, and showing that the judge, in ruling upon the objection, made an ill-tempered and undignified remark.

We do not deem it necessary to set forth in full the statement made by the appellant, for we can not yield to it as against the statement made by the judge. Where a matter takes place in the presence of the court, and the judge places in the record a statement of the occurrence, the appellate court is bound to accept as true the statement of the judge. It would lead to unseemly conflicts and greatly impair the power of a court, and much weaken the respect which counsel are bound to yield to it, to permit attorneys to contradict statements made by the judge rehearsing matters which occurred in open court. Where an act constituting a direct contempt is committed during an open session of court and in the presence of the judge, it is very doubtful whether the Legislature has power to require the judge to make any formal written charge, but we need not now decide that question—although it is proper to say, in passing, that the weight of authority is that the Legislature has no such power—for here, the judge in obedience to the statute, did make a formal statement. As that statement is confined to matters that occurred in open session, and in the presence of the judge, we must treat it as importing absolute verity.

While we are compelled to accept the statement of the judge as true, we can readily perceive, from the explanation contained in the counter statement of the appellant, that the judge was betrayed into a discourteous remark that was likely to inflame the anger of an attorney, and lead him into a line of conduct incompatible with the duty he owed to the court. It is a matter of regret that a judge should manifest bad

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temper while on the bench, or treat counsel rudely, but the wrong of the judge can not excuse the misconduct of counsel. It is often necessary for a judge to be stern and determined, but it is never necessary to be ill-tempered or discourteous. Even if we should adopt appellant's theory that the judge was in the wrong, still we can not assent to the conclusion that he was not himself guilty of a contempt, for the ill-temper or harshness of the judge will not excuse a positive disobedience of the orders of the court, or a contemptuous disregard of its authority.

The power to punish for direct contempts is inherent in all courts of superior jurisdiction. This power is not conferred by legislation, but is an inherent power residing in all superior courts. It is a power that the Legislature can neither create nor destroy. It is as essential to the preservation of the existence of courts as is the natural right of self-defence to the preservation of human life. The judicial is a co-ordinate department of the government, and courts are not the mere creatures of the Legislature, for, if they were, the judicial department would be a subordinate one, dependent for existence and power upon the will of the Legislature. This it is not, as the Constitution expressly declares and the united voice of the courts affirm. As it is a co-ordinate branch of government, and as judicial power can only live in the courts, it must follow that courts possess inherent powers which they do not owe to the Legislature, and among these powers is that of the right to punish direct contempts. This subject has been many times discussed, and the doctrine often affirmed, without diversity of judicial opinion, that courts do possess the power to punish contempts independent of legislation, and that this power is one the Legislature can neither destroy nor abridge. *Little v. State*, 90 Ind. 338 (46 Am. R. 224); *Rapalje Contempts*, section 1; *Criminal Contempts*, 5 Crim. L. Mag. 151. We are not, therefore, to look to the statute alone to discover what constitutes a contempt.

Disorderly conduct, insulting demeanor to the court, and

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a direct disobedience of its orders, *in facie curiæ*, constitute a direct contempt. These elements are here present, and we can do no otherwise than sustain the judgment of the trial court, although we may feel that there was something of hardship in the conduct of the judge. *Commonwealth v. Dandridge*, 2 Va. Cases, 408; *Rex v. Davison*, 4 B. & Ald. 329; *Thwing v. Dennie*, Quincy (Mass.), 338; *United States v. Emerson*, 4 Cranch C. C. 188; *Wilson's Case*, 7 Q. B. 984; *United States v. Anon.*, 21 Fed. Rep. 761.

The language used by Lord DENMAN, C. J., in *Wilson's Case*, *supra*, so well applies here that we quote it: "But here it appears that a contempt was supposed to have been committed. That is a case in which it becomes the unfortunate duty of a court to act as both party and judge, and to decide whether it has been treated with contempt. We can not decide upon the face of this return that they have come to a wrong conclusion. A court may be insulted by the most innocent words, uttered in a peculiar manner and tone. The words here might or might not be contemptuous, according to the manner in which they were spoken; and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the Royal Court, with which no other court can meddle. Every court in such a case has to form its own judgment." WILLIAMS, J., in the same case, said: "It is quite obvious that contempt may be shown either by language or manner. We can imagine language which would be perfectly proper if uttered in a temperate manner, but might be grossly improper if uttered in a different manner. No one not present can be a competent judge of this."

Judgment affirmed.

Filed March 5, 1886.

Bass *et al.* v. Elliott *et al.*

No. 12,273.

BASS ET AL. v. ELLIOTT ET AL.

DRAINAGE.—*Change of Judge.*—*Civil Action.*—A drainage proceeding is so far a civil action that the provisions of sections 412 to 417, R. S. 1881, in relation to a change of judge, are applicable thereto.

SAME.—*Remonstrance.*—*Special Finding.*—*Absence of Finding as to Public Utility, etc.*—Where it does not affirmatively appear from the special finding of facts, in a drainage proceeding, either that the proposed drain will improve the public health, or benefit a public highway or street, or be of public utility, the judgment must be for the remonstrants.

SAME.—*Exception to Conclusion of Law Admits Correctness of Facts.*—By accepting merely to the conclusions of law drawn from a special finding of facts, a party admits that the facts have been fully and correctly found by the court.

From the Shelby Circuit Court.

O. J. Glessner and *D. L. Wilson*, for appellants.

E. K. Adams, *L. J. Hackney*, *T. B. Adams* and *L. T. Michener*, for appellees.

Howk, J.—On the 25th day of April, 1883, appellants Bass and Gordon filed their petition in the clerk's office of the Shelby Circuit Court, praying therein for the location and construction of a certain ditch or drain, in Shelby county. Thereafter, on May 21st, 1883, proof was made by appellants, to the satisfaction of the court, that notice had been given of the filing of such petition, in the manner required by section 2 of the amendatory drainage act, of March 8th, 1883, more than twenty days before the day noted on the petition and set as the day for the docketing thereof. (Acts 1883, p. 174.) Thereupon, it was ordered and adjudged that the matter of such petition be entered on the dockets of the court, as an action pending therein. On May 26th, 1883, more than three days having elapsed after the docketing of such petition, and no demurrer, remonstrance or objection having been filed either to the form of the petition or to any of the commissioners of drainage, and the petition appearing to be sufficient, it was ordered and adjudged by the

105	517
124	452
105	517
121	196
105	517
147	179
105	517
148	221
150	102
105	517
168	532
168	586

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court that such petition be referred to the commissioners of drainage of Shelby county, who were required to meet on a day and at a place named in such order, and make a report of their proceedings in such matter to the court, on June 16th, 1883.

Afterwards, on June 18th, 1883, the commissioners of drainage filed, in open court, their report, verified by affidavit; and, on the same day, the appellees appeared and filed their remonstrances against such report. Afterward, on October 8th, 1883, the commissioners of drainage filed what is called "their amendment to their original report herein," and their affidavit annexed thereto. On the same day, appellees filed their written motion to strike from the files of this cause such amendment of the original report of the commissioners of drainage, for certain specified reasons. Afterwards, on October 11th, 1883, upon affidavit filed, appellees' motion for a change of venue from the judge, or a change of judge, was sustained by the court. Afterwards, on March 11th, 1884, before the Honorable Thomas W. Woollen, who had been duly appointed and qualified as judge *pro tempore* of the court below for the trial of this cause, appellees' motion to strike from the files the amendment to the original report of the commissioners of drainage was sustained by the court. The cause was tried by the court, and, at appellants' request, the court made a special finding of facts and thereon stated, as its conclusion of law, "that the ditch proposed is not of public utility, and the board of commissioners having taken jurisdiction thereof, this court will not interfere by ordering the construction of the ditch asked for in this cause." Over appellants' exceptions to its conclusion of law, the court rendered judgment for the dismissal of the cause, and that appellees recover of appellants their costs.

The first error complained of here by appellants' counsel, in their brief of this cause, is the sustaining of appellees' motion for a change of venue from the judge, or a change of judge. It is claimed by counsel, that a cause such as this is

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not a civil action, but a special proceeding under the statute concerning drainage; and, as that statute contains no provision for a change of venue from the judge, or a change of judge, counsel contend with some force and plausibility, that the court erred in sustaining the motion for a change of judge. But, under the recent decision of this court, the contention of appellants' counsel is untenable and can not be sustained. Thus, in *Neff v. Reed*, 98 Ind. 341, it was held substantially that a proceeding for the location and construction of a ditch or drain, under the statute concerning drainage, was so far a civil action that the provisions of the civil code, in relation to a motion for a new trial, were allowable and applicable to such proceeding. So, also, in *Crume v. Wilson*, 104 Ind. 583, the court said: "We are of opinion that in drainage cases the modes of procedure and the rules of practice prescribed by our civil code may properly be used to supply omissions in the drainage statutes." Accordingly, it was there held that, although there is no provision of our drainage statutes which authorizes the petitioner for a drain to dismiss his cause at any time, of his own motion, yet the provisions of section 333, R. S. 1881, in relation to the dismissal of a civil action by the plaintiff, were applicable to drainage cases, and the petitioner for a drain might thereunder, at the proper time, dismiss his petition. Applying the doctrine of the cases cited to the case in hand, we have no difficulty in reaching the conclusion that a proceeding for the location and construction of a ditch or drain, under our drainage statutes, is so far a civil action that the provisions of sections 412 to 417, R. S. 1881, in relation to a change of venue from the judge, or, more aptly speaking, a change of judge, must be held applicable to such a case as the one under consideration. Our conclusion is, therefore, that the court did not err in sustaining appellees' motion for a change of judge. See, also, as bearing upon the question we have been considering, the recent cases of *Burkett v. Holman*, 104

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Ind. 6; *Powell v. Powell*, 104 Ind. 18; *Burkett v. Bowen*, 104 Ind. 184; *Evans v. Evans*, *ante*, p. 204.

The alleged error of the court in its conclusions of law upon the facts specially found, is the only other error of which appellants' counsel complain here in argument. The facts found by the court were, in substance, as follows: On the 12th day of February, 1881, proceedings were instituted before the board of commissioners of Shelby county, to which proceedings appellants were parties, to establish a ditch, beginning about 1500 feet west of the beginning of the proposed ditch in this cause, on the lands of Alfred Fox; and such proceedings were had that such ditch was located, and the report of the viewers, making the assessments and allotments, was filed in the auditor's office of such county on October 15th, 1881. Such report was approved and acted on by the county board, and the allotments therein made to parties along the line of the ditch were to be completed by such parties by November 20th, 1881, which was the time for the completion of such ditch as provided by the viewers' report, and none of the ditch was then completed, although several of the parties had begun the construction thereof. Afterwards, on December 9th, 1882, and more than one year after the time of completion, as provided by the viewers' report, the several allotments were by the auditor of such county, under the statute, sold out; and the parts heretofore allotted to the parties, appellants and appellees herein, were bought in by them respectively, and a bond executed by each, with approved security, payable to the State of Indiana, conditioned that such work and allotments would be completed by January 10th, 1883.

Under such sales and allotments, parts of such ditch have been completed and received by the engineer appointed by the county board to superintend such work, the part completed being about one-third of the line of the ditch being constructed by the county board, and all of such ditch has had some work done thereon under such proceedings.

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It was also found by the court that the pending ditch proceeding was commenced after the time had elapsed for the completion of the work under such sales by the county auditor, but before such completion, to wit, on April 25th, 1883; that the ditch therein proposed would begin about 1500 feet east of the one then under construction by the county board, and would run directly the entire 1500 feet, to the head of the latter ditch, and would thence follow nearly the course of such ditch, and would be of about the same character and capacity, and its terminus would be different, though not varying materially from the terminus of such ditch; that the ditch being constructed by the county board will, if completed, be of sufficient capacity to drain all the lands that would be drained by the ditch proposed in this cause, except that part east of the beginning of the former ditch, and that that part can as well be drained without interfering with the construction of the first ditch by the county board.

The foregoing is a full statement of the facts specially found by the trial court. Whatever else may be said of those facts, we are clearly of the opinion that, upon the facts found, there can be no other or different conclusion of law than the one stated by the trial court, namely, a finding for the appellees, the remonstrants or defendants below; for it will be observed that the trial court failed to find as facts, "either that the public health will be improved or that one or more public highways of the county, or street or streets of a town or city, will be benefited by the proposed drainage, or that the proposed work will be of public utility." In the absence of an affirmative finding of one or more of these facts, from the special finding of facts, the conclusion of law thereon could not be otherwise than a finding in favor of the appellees and against the appellants. In the trial court appellants did not question the correctness of the special finding of facts, either by a motion for a *venire de novo*, or by a motion for a new trial; and the questions are presented here solely upon their exceptions to the court's conclusions of law. It is settled by

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our decisions that, by their exceptions to the conclusions of law, appellants admitted that the facts of this cause were fully and correctly found by the court, but said that the court had erred in applying the law to the facts so found in its conclusions of law. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, 74 Ind. 110; *Fairbanks v. Meyers*, 98 Ind. 92; *Helms v. Wagner*, 102 Ind. 385.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed March 5, 1886.

106	699
128	476
106	625
131	291
106	522
145	905
145	208
147	689

No. 12,391.

WALLACE, ADMINISTRATOR, v. LONG, GUARDIAN.

STATUTE OF FRAUDS.—*Agreement to Make Child an Heir.—Part Performance.*

—Where a childless husband and wife, in consideration that a young girl shall live with them until the death of both, in all respects as their own child, and render such service as she is capable of doing, orally agree to make her their heir, and at their death, or at the death of the survivor, to will her the entire estate of which they are possessed, consisting at the death of the survivor of real estate, and also of personal property exceeding fifty dollars in value, the agreement is within the statute of frauds, and performance on the part of the girl will not take it out of the statute. *Frost v. Tarr*, 53 Ind. 390, and *Lee v. Carter*, 52 Ind. 342, modified.

SAME.—*Services of Child.—Recovery on Quantum Meruit.*—Where services have been performed in consideration of property to be conveyed, if the contract is not enforceable by reason of the statute of frauds, the action is not on the special contract for damages, but on a *quantum meruit* to recover the value of the services.

SAME.—*Measure of Damages.*—In such a case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages.

SAME.—*Situation of Parties Considered in Estimating Value of Services.*—In estimating the value of the services, regard should be paid to the situation of the parties, and the nature of the services required or performed.

From the Marion Circuit Court.

Wallace, Administrator, v. Long, Guardian.

L. Wallace, E. A. Brown, L. M. Harvey, T. L. Sullivan
and *A. Q. Jones*, for appellant.

J. E. Florea, A. W. Wishard and *H. N. Spaan*, for appellee.

MITCHELL, J.—David D. Long, as guardian of Mollie Fette, filed a complaint in the nature of a claim against the estate of Maria Fette, deceased.

The substantial averments of the paragraph upon which the judgment rests are as follows: About the 22d day of February, 1871, the decedent and her husband, being childless, requested the plaintiff's ward, then about seven years old, a niece of the husband, to live with them, and, becoming much attached to her, they proposed and agreed at that time and afterwards, "that, if she would live with them during their lifetime, and until the death of both, and become and act and do by them and toward them as their child, and permit herself to be known and called as their child, and if she would respect and treat them as her parents, and do such work about their house and would render them such services and assistance in the care and keeping of their house and property as she was capable of doing, and if she would care for them and nurse them in sickness and would continue with them and live with them until their death, they would treat and deal with and towards her as their child, they would make her their heir, and at their death, or at the death of the survivor of the two, they would will, bequeath and give her the entire estate of which they were possessed."

The ward accepted the proposal so made, and faithfully performed the agreement on her part. Charles Fette, the husband, died about March 15th, 1881, having left all his property to his widow. The agreement was then renewed between the ward and Mrs. Fette. The agreement was faithfully performed by the former until the death of the latter, which occurred December 17th, 1883. It is averred that

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Mrs. Fette neglected to make the will according to the agreement, and died intestate.

The claim is to recover the value of the estate, estimated at \$6,000. Upon issues duly made there was a trial by a jury. The evidence tended to show that the intestate left real estate of the value of \$5,000, and a personal estate of about \$1,000 in value.

There was a verdict for the plaintiff for \$6,025, and, over a motion for a new trial, judgment was entered on the verdict for \$6,000, the plaintiff having entered a remittitur of \$25. Following the entry of judgment, the record recites the following order, made by the learned judge who presided at the trial: "Inasmuch as this case is not without difficulty, it is ordered by the court that the defendant, as administrator, do at once take and prosecute with reasonable diligence an appeal to the Supreme Court of the State of Indiana."

Of the errors assigned here the only one discussed is the overruling of the motion for a new trial. This motion assigned as causes for a new trial, that the verdict was contrary to law and to the evidence, that it was not sustained by sufficient evidence, that the damages were excessive, and that the court erred in giving and refusing certain instructions.

It may be said, the evidence tends to establish the averments in the complaint, and if no legal impediment stood in the way it might fairly support the verdict.

The case proceeded upon the assumption that if the contract was proved substantially as alleged, and performance of it was shown on the part of the ward, an action for damages for the violation of the contract might be maintained, and that the measure of recovery to which she was entitled was the value of the real and personal estate of the intestate, irrespective of the actual value of the services rendered.

The argument for an affirmance of the judgment is predicated upon the affirmation of the following propositions:

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1. That the action is for damages for the breach of an express parol contract.

2. That the contract is not within the statute of frauds.

3. That the measure of damages is the value of the estate agreed to be devised.

Upon the authority of *Frost v. Tarr*, 53 Ind. 390, it is conceded that an action for the specific performance of the contract is not maintainable, and upon the authority of that case, and the cases of *Bell v. Hewitt*, 24 Ind. 280, and *Lee v. Carter*, 52 Ind. 342, it is insisted that the contract is clear of the statute of frauds, and that the measure of recovery should be the value of the estate.

A brief examination of the argument, and the cases above mentioned, seems to be required.

The concession that the contract can not be specifically enforced, involves the conclusion that it is within the inhibition of the statute. If the statute of frauds presents no obstacle to the enforcement of the contract, then, so far as the record discloses, none exists. It can not, of course, be denied, that if the contract had been in writing, or if, in pursuance of an oral contract, the plaintiff had been put in complete possession, and she had otherwise fully performed on her part, specific performance could have been enforced. It would then have presented a case analogous in principle to *Mauck v. Melton*, 64 Ind. 414. That was a case in which an oral contract was made, which provided that in consideration of board to be furnished and services to be performed, a tract of land would either be conveyed or devised by will. The person agreeing to perform the service was put in possession of the land, and it was held, the services having been performed, that the contract would be specifically enforced.

It is true it was there said that the contract was not within the statute of frauds. In saying this nothing more was meant, in view of the facts, than that, by reason of the part performance of the contract, it had been taken out of the operation of the statute, and might, therefore, be specifically enforced.

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Atkinson v. Jackson, 8 Ind. 31; *Watson v. Mahan*, 20 Ind. 223; *Lafollette v. Kyle*, 51 Ind. 446; *Law v. Henry*, 39 Ind. 414; *Stater v. Hill*, 10 Ind. 176; *Moreland v. Lemasters*, 4 Blackf. 383; *Arnold v. Stephenson*, 79 Ind. 126.

The case of *Baxter v. Kitch*, 37 Ind. 554, involved a state of facts similar to *Mauck v. Melton*, *supra*. No possession having been delivered under the contract, the court said: "It is a contract for the sale of real estate; and, to be made a sufficient foundation of the action, must have been in writing and signed by William Prickett, the deceased."

The cases of *Neal v. Neal*, 69 Ind. 419, and *Johns v. Johns*, 67 Ind. 440, involved the principle here under consideration, and the holding in both was that the statute of frauds prevented the enforcement of the contract.

This much has been said to show that the only impediment in the way of a specific enforcement of the contract involved in this case is the statute of frauds.

When the title to property, either real or personal, is to be acquired by purchase, the statute of frauds will operate upon and affect the contract in precisely the same manner, whether the consideration for the purchase is to be paid in services, money or anything else. In either case, such a contract, being in parol and entirely executory, can not be enforced by either party, and it may be doubted whether a contract, which is within the statute so as to be incapable of specific enforcement, has sufficient validity to support an action for damages by either party, unless the contract was induced under, or its violation is involved in, some special circumstances of fraud or bad faith. *Barickman v. Kuykendall*, 6 Blackf. 21; *Ballard v. Bond*, 32 Vt. 355; *McCracken v. McCracken*, 88 N. C. 272; *Bender v. Bender*, 37 Pa. St. 419. The most that can be recovered in such a case is the value of what may have been paid or performed by one party in reliance upon such a contract, when the other refuses to perform. Reed Stat. of Frauds, sections 737, 761-2; *Day v. Wilson*, 83 Ind. 463 (43 Am. R. 76).

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Where, therefore, services have been performed, or money paid, in consideration of property to be conveyed, if the contract is not enforceable by reason of the statute of frauds, the action is not on the special contract, but, in the case of services performed, the action is on a *quantum meruit* to recover the value of the services. *Ham v. Goodrich*, 37 N. H. 185; *Emery v. Smith*, 46 N. H. 151; *Leslie v. Smith*, 32 Mich. 64; *Seymour v. Bennet*, 14 Mass. 266; 2 Reed Stat. of Frauds, sections 622, 623, and cases cited in notes; 2 Sutherland Dam. 453. In such a case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages.

Returning to the cases relied on, *Bell v. Hewitt*, *supra*, was an action on a special contract for services, to be compensated by a promised legacy of \$500. The contract involved the payment of a specified sum of money in a manner agreed upon. It was held, that as the contract was upon a definite consideration, and liable to be performed within one year, it did not come within the fifth subdivision of the statute of frauds, which inhibits the bringing of actions upon oral contracts, not to be performed within one year from the making thereof. There was in that case clearly no impediment in the way of the maintenance of an action on the contract to recover the stipulated wages. This case was followed in *Caviness v. Rushton*, 101 Ind. 500 (51 Am. R. 759), which involved the same principles.

The next case, *Lee v. Carter*, 52 Ind. 342, was decided, so far as it touches the question under consideration here, on a demurrer to the complaint, which was in the nature of a claim filed against the estate of one Carter. The substance of the complaint as set out in the opinion is, that Cline agreed with Carter that if the latter would take possession of the farm of the former, and clear and improve such portions as he might be able, and permit Cline to reside with him, do his mending, washing, and furnish his boarding, Cline would compensate him by devising all of his property, real and per-

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sonal, to Carter or his children; that Carter took possession, cleared about one hundred acres of the land, built fences, dwelling-house and stable, and otherwise fully performed his contract; that Cline died, leaving real and personal property of the value of \$8,600, without making the will or otherwise compensating Carter, who had performed services worth \$10,000.

The facts stated in the complaint showed such a part performance of the contract as clearly to take it out of the statute of frauds, and the complaint contained the statement of such facts as would have warranted the specific enforcement of the contract, as in *Mauck v. Melton, supra*, and the cases of that class cited above in connection with it, or, possibly, owing to the part performance averred, of making the contract the basis of an action for damages for its violation.

The complaint, however, was held good, and the contract was said to be clear of the statute of frauds, upon the authority of *Bell v. Hewitt, supra*. This, as it seems to us, was, to some extent at least, a misapplication of *Bell v. Hewitt, supra*. The contract to devise land and to bequeath personal property, exceeding fifty dollars in value, was clearly within the statute, and so far as it was withdrawn from its operation, if at all, it was by the acts of part performance which are set forth in the complaint. It does not appear what rule of damages was applied in the case.

The case of *Frost v. Tarr, supra*, arose out of the following facts: The father of Jane Tarr agreed with Simeon Frost that Frost should take Jane into his family, board, educate and clothe her as his own child until she was twenty-one years old, or was married, and that if she continued so to live with him and his family, and do the ordinary house work usually performed by girls in housekeeping, he would bequeath to her a share equal in value to that given any of his children. It was alleged that she had fully performed, that Frost died without leaving her anything by his will, except fifty dollars, and that he left an estate in real and personal property of the

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value of twenty thousand dollars, the greater portion of which he bequeathed to his son. She demanded judgment for one-sixth part of the estate, and for four thousand dollars damages. It was there said by the court: "That the contract alleged is one, the specific performance of which would not be decreed. But it does not follow, because a court will not decree specific performance of a contract, that therefore no action for damages will lie upon it when it has been violated. On the contrary, we think such action will lie, and that the damages in this case may be measured by the value of the portion which was promised, and that the plaintiff, in such case, is not limited to the value of the services performed, in the recovery." *Bell v. Hewitt, supra*, and *Lee v. Carter, supra*, were cited in support of the rule announced. It was said further, that there was nothing in "the question made as to the section of the statute of frauds which requires contracts not to be performed within a year from the making thereof to be in writing."

As respects other provisions of the statute of frauds, no question seems to have been made, and none was considered. The rule thus enunciated in respect to the right to sue for the violation of the contract, and what shall be the measure of recovery in such cases, seems to us, in view of the facts on which the cases cited in its support rest, and what has already been said in reference to them, to receive but incidental support from those cases.

That, under the pressure which in this class of cases was brought to bear on the courts, this rule in one form and another prevailed in the earlier decisions in some of the States, is well known, but, as is said by a learned author, "It gradually dawned upon the judges that there was no real difference between the land itself and its market value; and that allowing the plaintiff to recover the latter was, in effect, giving him specific performance of the contract." 2 Reed Stat. of

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Frauds, section 738. The position has long since been abandoned in all the States with but one or two exceptions.

Of the earlier cases which sanctioned the rule of *Frost v. Tarr*, *supra*, to a degree, were *Jack v. McKee*, 9 Pa. St. 235, *Bash v. Bash*, 9 Pa. St. 260, *McDowell v. Oyer*, 21 Pa. St. 417, *Malun v. Ammon*, 1 Grant's Cases, 123. To these may be added, as lending some sanction to the doctrine, the cases of *Burlingame v. Burlingame*, 7 Cow. 92, *King v. Brown*, 2 Hill, 485, and *Hopkins v. Lee*, 6 Wheat. 109.

In overruling *Jack v. McKee*, *supra*, and the other cases following it, the Pennsylvania court said, in *Hertzog v. Hertzog*, 34 Pa. St. 418: "Whenever a departure from settled principles is shown by actual experience to have worked perniciously, to have occasioned wrong and hardship that were not anticipated, and to have placed the inheritance of families at the mercy of parol evidence, we think it the imperative duty of the court that made the departure, to undo the mischief as far as possible, and to retrace their steps back to the old paths." It was further declared by the learned judge delivering the opinion in that case, that under the rule in *Jack v. McKee*, *supra*, a grandson, whose services, at his own estimate, did not exceed in value eighteen hundred dollars, had swept away the fairest portion of an estate, by a recovery of ten thousand dollars, while, in another case, a domestic, whose services, had they been the subject of compensation, would have been comparatively insignificant, had, under the rule above mentioned, taken an entire estate from the right heir. A rule under which such disastrous and anomalous results are possible should not, in our opinion, be perpetuated, unless it finds its support in principles that are altogether beyond cavil.

The same year in which the Pennsylvania court overruled *Jack v. McKee*, *supra*, and other kindred cases, the New York court in *Erben v. Lorillard*, 19 N. Y. 299, disapproved of so much of *Burlingame v. Burlingame* and *King v. Brown*, *supra*, as lent any support to the doctrine under consideration.

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It must, we think, be conceded that every provision of the statute of frauds exerts its influence upon contracts, such as we are here considering, to the same extent and with the same potency as upon other contracts for the sale and transfer of property, and if there is one class of cases more than another in which "a tight rein should be held," and the statute rigorously applied, it is that class in which it is proposed by parol to intercept from rightful heirs the transmission of estates. *Graham v. Graham*, 34 Pa. St. 475. That the evidence in this case tends to support the view that it was the purpose of the intestate to make provision for the plaintiff's ward by a will, may be conceded, but as the agreement to do so was never manifested in writing, signed by her, and as it involved an agreement for the sale of real estate, and for the transfer of personal property exceeding in value \$50, such agreement was subject to the operation of the statute of frauds, equally with all other agreements for like sales. Because the agreement was not withdrawn from the operation of the statute by part performance, it can not be specifically enforced, neither can it be the foundation of an action for damages. *Browne Stat. of Frauds*, section 124.

It does, however, serve to rebut any presumption which otherwise might have obtained, that the services rendered were to have been gratuitously performed, or that they were performed under the mere expectancy that the intestate would leave the plaintiff's ward a legacy. She is, therefore, entitled to recover the value of her services. *Jacobson v. Executors, etc.*, 3 Johns. 199; *Robinson v. Raynor*, 28 N. Y. 494; *Campbell v. Campbell*, 65 Barb. 639; *Reynolds v. Robinson*, 64 N. Y. 589; *Emery v. Smith*, 46 N. H. 151; *Sutton v. Rowley*, 44 Mich. 112; *Welch v. Lawson*, 32 Miss. 170; *Bender v. Bender*, 37 Pa. St. 419; *Maddison v. Alderson*, L. R. 8 App. Cases, 467 (35 Moak's Eng. Rep. 790); *Clark v. Davidson*, 53 Wis. 317; *Howard v. Brower*, 37 Ohio St. 402; *Wood Frauds*, sections 221, 235.

Many other cases might be cited which support and illus-

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trate the conclusions reached, but those referred to are deemed sufficient.

The value of the services is to be determined without any reference to the value of the estate of the intestate. But, in estimating the value of the services, regard should be paid to the situation of the parties, the nature of the service required or performed. Allowance should be made, too, for the fact that, under the circumstances, the presence and society of the plaintiff's ward may have been of sufficient value to compensate for her education, clothing and support.

To the extent that *Frost v. Tarr*, and *Lee v. Carter*, *supra*, announce a rule contrary to the conclusions herein reached, they may be considered as modified.

The judgment is reversed with costs, with directions to the court to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed March 5, 1886.

No. 12,285.

TROUT v. PERCIFUL.

LANDLORD AND TENANT.—*Lease.*—*Condition as to Sale.*—*Pretended Sale to Defraud Lessee.*—*Damages.*—Where a lease is executed, to be effective on the condition that the owner of the land does not sell it, a sale in good faith is contemplated, and if the lessee is defrauded of his rights under the lease by a pretended sale made for that purpose, he may maintain an action against the lessor for damages.

PRACTICE.—*Motion for New Trial.*—Questions as to the admission of evidence, and as to the assessment of damages, which are not presented by a motion for a new trial, will not be considered.

From the Clinton Circuit Court.

J. V. Kent and *J. W. Merritt*, for appellant.

ELLIOTT, J.—The complaint of the appellee contains these

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allegations: That the appellant leased to him a tract of land for the term of one year; that the taking effect of the lease was conditioned on the contingency that the appellant did not sell the land; that the appellee was ready and willing to pay the rent stipulated; that the appellant made a pretended sale of the land to one John Young, and put him in possession of part of it; that the pretended sale was made for the fraudulent purpose of depriving appellee of the land under his lease; that there was no consideration paid by Young, and that the appellant has wrongfully refused to allow appellee to take possession under his lease.

The complaint was not demurred to, but is here assailed by the assignment of errors. We think that the error is not well assigned, for, though the complaint is not well drawn, it is sufficient to resist an attack made after verdict. It shows that the sale was a fraudulent one, made for the purpose of defrauding the lessee out of his rights under the lease, and such a sale is not one that will defeat the contract; for, where a contract makes a sale a condition, it means a sale in good faith, and not a fraudulent one. Parties who contract respecting a sale have in contemplation a sale in good faith, and not one founded in fraud. It would be strange, indeed, if a lessor could, by a fraudulent sale made for the purpose of defeating his lessee, avoid the lease, and thus avail himself of his own wrong.

The objections suggested to the admission of evidence can not be considered, for there are no causes stated in the motion for a new trial presenting any questions upon the admission of evidence. We can not disturb the verdict upon the evidence.

There is no question presented by the motion for a new trial as to the assessment of damages, and hence no such question is presented to us.

Judgment affirmed.

Filed March 6, 1886.

Hasseld et al. v. Seyfort, Assignee.

No. 12,018.

HASSELD ET AL. v. SEYFORT, ASSIGNEE.

VOLUNTARY ASSIGNMENTS.—Omitted Property.—Execution.—Right to Possession.—Under the statute of this State regulating assignments for the benefit of creditors, when personal property is omitted from the schedule, whether by mistake or otherwise, and is afterwards surrendered to the trustee, or is taken possession of by him as a part of the estate, he may, as against executions subsequently issued and levied, retain and dispose of it in the execution of the trust.

SAME.—Purpose of Statute.—Assignor's Property in Custody of Court.—The purpose of the statute is to carry into the trust all of the assignor's property, and when a failing debtor takes advantage of its provisions, he thereby places his property in the custody of the court, to be disposed of by the trustee under its direction and control.

From the Owen Circuit Court.

L. B. Swift, for appellants.

J. C. Robinson, I. H. Fowler, H. J. Milligan and W. H. H. Miller, for appellee.

ZOLLARS, J.—We take from appellee's brief the following summary of the facts in the case, which is substantially correct: "On the 24th day of December, 1883, John Kayser, by deed, that day recorded in Greene county, Indiana, made a voluntary assignment, under the statute of Indiana, of all his property to appellee, in trust for the benefit of all his creditors. The appellee, on that day, duly qualified as trustee and took possession of the property specifically described in the deed of assignment. Learning from the assignor that in the adjoining county of Clay there were certain articles of personal property—the same here in controversy—which were not specifically described in the schedule accompanying the deed, through, it appears, oversight and misapprehension, the trustee demanded of the assignor that they be delivered into his possession as part of the assigned estate, and they were so delivered and taken into full possession by the trustee on the next day after the assignment, to wit, December 25th, 1883, and on the 28th of the same month inventoried

105	534
127	301
105	534
147	93
147	234
105	534
149	583

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with the other assigned property as part of the assets in the hands of the trustee for the benefit of all the creditors. On December 27th, 1883, the appellants recovered judgments against the assignor before a justice of the peace, and on that day levied executions on the Clay county personal property, which had two days before come into the possession of the trustee as above recited. This action was then instituted by appellee before the justice to try his right to the property. It is assumed by both parties that at the date of assignment, the title to the property in dispute was vested in the assignor."

Judgment was rendered for appellee in the circuit court, giving him the property in dispute, as against the claim of appellants under their executions.

In support of their motion for a new trial, and under the assigned error in the overruling of that motion, appellants insist that the judgment is not sustained by sufficient evidence, and is contrary to law.

Their contention is, that the so called Clay City property, consisting of boots and shoes, did not pass to the assignee, although it was surrendered to and taken possession of by him as a part of the assigned estate, for the benefit of all the creditors, because it is not described in the schedule which accompanied the indenture of assignment. They rest their contention upon the rule, that where general words are followed by a specific clause, the latter will restrict and limit their operation, and the instrument will be construed according to the specific clause; and also upon a class of cases in which it has been held, that in the application of this rule, general words of grant in deeds of assignment will be limited by and restricted to the property described in the schedule, to which reference is made in the deed for a more specific description, and that no property will pass to the assignee except such as is described in such schedule.

These cases, undoubtedly, rule the law correctly, where the assignment is purely voluntary, without reference to, or un-

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affected by statutes, and where a different intent is not made to appear.

Whether the rule they lay down is applicable and controlling here, will depend upon the construction that shall be given to our statute, and the indenture of assignment executed by Kayser to appellee.

Section 2662, R. S. 1881, provides that any debtor in embarrassed or failing circumstances may make a general assignment of *all* his property, in trust for the benefit of his *bona fide* creditors; and that assignments for such purpose, except as provided for in the act, shall be deemed fraudulent and void.

Section 2663 is as follows: "All assignments under this act shall be by indenture duly signed and acknowledged before some person duly authorized to take the acknowledgment of deeds, and shall, within ten days after the execution thereof, be filed with the recorder of the county in which the assignor resides, whose duty it shall be to record the same as deeds are recorded. The indenture of assignment shall contain a full description of all real estate thus assigned, and be accompanied by a schedule containing a particular enumeration and description of all the personal property assigned; and the assignor shall make oath, * * * that said indenture and schedule contain a statement of all the property, rights, and credits belonging to him, or of which he has any knowledge, and that he has not directly or indirectly transferred or reserved any sum of money or article of property for his own use or the benefit of any other person, and has not acknowledged a debt or confessed a judgment to any person or persons for a sum greater than was justly owing to such person or persons, or with the intention of delaying or defrauding his creditors. No assignment under this act shall convey to the assignee any interest in the property so assigned until such assignment is recorded as provided for in this section."

Section 2664 provides that within fifteen days after the execution of the assignment, the trustee shall file a copy of

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the assignment and schedule in the office of the clerk, and shall, before entering upon the execution of the trust, make oath that the property assigned has been actually delivered into his possession for the uses declared in the assignment, and of the probable value of the property so assigned, etc.

Section 2666 provides that for the neglect of such duties, the court may remove the trustee and appoint another.

Section 2667 provides that the trustee shall, within thirty days after entering upon the duties of his trust, make and file, under oath, a full and complete inventory of all the property, real and personal, the rights, credits, interests, profits and collaterals which shall have come to his hands, *or of which he may have obtained knowledge as belonging to the assignor*. It is further made his duty, whenever any property not mentioned in said inventory *comes to his hands, or when he obtains satisfactory information of the existence of such property*, to file an additional inventory of the same, under like regulations, etc.

Section 2676 provides that if the trustee or a creditor shall satisfy the court that the assignor has fraudulently *withheld*, or has fraudulently transferred any part of his property, such court, or the judge thereof in vacation, may order the arrest of the assignor, and the person to whom such fraudulent transfer is believed to have been made, etc., have him or them brought before the court, and subject such property as has been fraudulently withheld or transferred, to the operation of the general trust.

An examination of the statute, of which the above sections are a part, makes it apparent that its purpose is to carry into the trust all of the assignor's property, and that where a person takes advantage of its provisions and makes an assignment for the benefit of his creditors, he thereby places his property in the custody of the court, to be disposed of by the assignee under the direction and control of the court. *Grubbs v. Morris*, 103 Ind. 166. By the indenture of assignment, and the proceedings under it, the title to the prop-

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erty passes to the trustee for the purpose of the trust, and only for that purpose, because the court may remove the trustee named in the indenture of assignment and appoint another in his stead. The trustee thus appointed has the same title to the property that his predecessor had, although no separate or additional indenture is made to him by the assignor.

It is apparent too, that some property at least, whether real or personal, becomes subject to the trust, although not described in the indenture of assignment or schedule.

Property fraudulently withheld, or fraudulently conveyed, of course, will not be described in the deed or schedule, and yet such property, upon the discovery of it, will be subjected to the operation of the general trust. See *Simpson v. Warren*, 55 Maine, 18; *Pillsbury v. Kingon*, 33 N. J. Eq. 287 (36 Am. R. 556); *Klapp v. Shirk*, 13 Pa. St. 589; *Thomas v. Talmadge*, 16 Ohio St. 433. And so, section 2664 makes it the duty of the trustee to make oath that the property assigned has been delivered into his possession for the uses declared in the assignment. This, doubtless, has reference to the property described in the deed and schedule. Section 2667 requires him to make and file an inventory of this property, and also of the property of which he shall have obtained knowledge as belonging to the assignor. If, after making such inventory, other property comes into his hands, or he obtains satisfactory information of the existence of other property, he is required to make and file an additional inventory. If all the property is described in the deed and schedule accompanying it, there could be no such thing as discovering other property of the assignor. Succeeding sections make it the duty of the trustee to have all the property in the inventories appraised, and to proceed to sell it and make report. It thus seems to be made apparent, that the trustee may, at least, take possession of and sell personal property that is not described in the deed and schedule.

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In the case of *Faxon v. Durant*, 9 Met. 339, where a debtor assigned property, described in a schedule, in trust for his creditors, and afterwards delivered to the assignee a chattel not included in the schedule, either knowing that it was not so included therein, or intending, whether it was so included or not, that it should be appropriated to the benefit of his creditors, it was held that the property in the chattel passed to the assignee in trust for the creditors, and that the assignor could not reclaim it.

However it might be in the absence of a statutory provision upon the subject, we feel satisfied that under our statute, when personal property is omitted from the schedule, whether by mistake or otherwise, and is afterwards surrendered to the trustee, or is taken possession of by him as a part of the estate, he may, as against executions subsequently issued and levied, retain and dispose of it in the execution and for the purposes of the trust.

Having reached this conclusion, questions made upon the admission of some of the evidence becomes immaterial.

The indenture of assignment very plainly manifests the intention on the part of the assignor to assign all of his property. It is therein stated that being indebted to various and numerous creditors, and being in embarrassed and failing circumstances, he is desirous that *all* his property and effects shall be devoted to the payment of said debts, in a fair and ratable proportion, and that to consummate that purpose, and to secure the aid and benefits of the above statute providing for a general assignment for the benefit of creditors, the assignment is made, etc.

Following these declarations of the purpose of the assignment are the terms of grant, as follows: "The said John Kayser, by this instrument, does hereby sell, assign, convey and transfer to George Seyfort, all the property of whatsoever kind belonging to him, or in which he has any interest, being the following real estate: * * * And all goods, wares and merchandise, together with accounts, claims, demands,

Hasty v. City of Huntington.

notes and choses in action. A more particular description is hereto attached and made a part hereof, marked 'Exhibit A' (he reserving for his own use said property to the value of \$600 under the exemption laws), to be held and disposed of by said George Seyfort in trust," etc.

An affidavit is attached, containing an oath by the assignor that the indenture and schedule contain a statement of all his property of which he had any knowledge. The schedule referred to does not contain a description of the property here in dispute. It is shown to have been omitted by mistake.

We have thus referred to the deed and schedule, not for the purpose of passing upon the question as to whether or not the schedule shall limit and restrict the general words of grant in the deed, but only for the purpose of showing that upon the face of the papers the purpose is manifest to make a general assignment of all the property of the assignor, in compliance with the provisions of the statute.

As against a motion to arrest the judgment, the complaint would be good without a copy of the assignment filed therewith. *Eigenmann v. Backof*, 56 Ind. 594. We think, however, that the record shows affirmatively that a copy of the assignment was filed with and as a part of the complaint.

Judgment affirmed, with costs.

ELLIOTT, J., did not participate in the decision of the case.

Filed March 9, 1886.

106 540
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105 540
130 156

No. 12,355.

HASTY v. CITY OF HUNTINGTON.

CITY.—*Public Improvements.*—*Building Permits.*—*Validity of Ordinance.*—Under section 3106, R. S. 1881, the common council of a city incorporated under the general law has power to enact an ordinance making it unlawful to erect a building within such city without first making application to the clerk of the board of public improvements.

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PLEADING.—*Complaint before Mayor or Justice.*—In actions originating before the mayor of a city or a justice of the peace, the complaint is sufficient if it will inform the defendant of the nature of the cause of action, and is so explicit that a judgment thereon will bar another action for the same cause.

From the Huntington Circuit Court.

J. B. Kenner and J. I. Dille, for appellant.

B. F. Ibach, for appellee.

Howk, J.—In this case the appellant Hasty, the defendant below, has here assigned as errors the decisions of the circuit court in overruling (1) his demurrer to the complaint, (2) his motion for a new trial, and (3) his motion in arrest of judgment.

The *first* and *third* of these alleged errors may properly be considered together, as they each call in question the sufficiency of appellee's complaint, the *first* before and the *second* after the trial and finding thereon. The suit was commenced before the mayor of the city of Huntington, and was taken by appeal to the court below. In its complaint the city of Huntington alleged that appellant, on or about the 17th day of April, 1883, at the city and county of Huntington, then and there violated section three of an ordinance of such city, passed by the common council thereof on the 6th day of March, 1882, by unlawfully erecting a building or a structure in the third ward of such city, without first making application to the clerk of the board of public improvements of such city, as required by such section. Wherefore, etc.

In the *thirty-second* clause of section 3106, R. S. 1881, in force since March 10th, 1873, power is conferred upon the common council of a city incorporated, as the city of Huntington was, under the general law of this State for the incorporation of cities, "To organize a board of public improvements, and empower such board to grant permits to build houses or additions thereto." The validity of the city ordinance, or of the section thereof, for the violation of which the appellant was prosecuted in the case at bar, is in no man-

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ner questioned in the brief of his counsel, and, therefore, can hardly be said to be involved in this appeal. For this reason it might well be held, as it seems to us, that this court has no jurisdiction of this appeal. Because, as the amount in controversy, exclusive of interest and costs, is only one dollar, and as the cause originated before the mayor of a city, and does not involve the validity of a city ordinance, the appeal is not authorized by the provisions of section 632, R. S. 1881, regulating appeals to this court.

Passing this point, however, as it is not made by appellee's counsel, we may say that the ordinance of the city of Huntington, and the section thereof, for the violation of which appellant is prosecuted in this cause, were held to be valid by this court in the well considered case of *Baumgartner v. Hasty*, 100 Ind. 575 (50 Am. R. 830), and we adhere to that decision.

In regard to the sufficiency of appellee's complaint, it will suffice to say that such complaint conformed to the requirements of section 3066, R. S. 1881, in relation thereto, that it informed appellant of the nature of the cause of action, and was so explicit that a judgment thereon could be used as a bar to another suit for the same cause of action. In actions originating before the mayor of a city or a justice of the peace, we have often held that such a complaint was sufficient. *Hewett v. Jenkins*, 60 Ind. 110; *Beineke v. Wurgler*, 77 Ind. 468; *Western Union Tel. Co. v. Huff*, 102 Ind. 535. The court did not err, we think, in overruling either the demurrer to the complaint or the motion in arrest of judgment.

In appellant's motion for a new trial the only cause assigned therefor is that the finding of the court was contrary to law. This cause for a new trial did not below, nor does it here, call in question the sufficiency of the evidence to sustain the finding. Yet that is the only question discussed by appellant's counsel in considering the alleged error of the court in overruling the motion for a new trial. The question is not presented here for consideration or decision. We

Price, Administrator, et al. v. Jones.

fail to see, and counsel have failed to point out, wherein the finding of the court was contrary to law.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed March 6, 1886.

No. 12,086.

PRICE, ADMINISTRATOR, ET AL. v. JONES.

PROMISSORY NOTE.—*Promise to Pay After Death.*—*Testamentary Disposition.*

—An instrument, dated and signed, reading, "One day after my death I promise to pay to the order of Nancy M. Jones two thousand dollars, to be paid out of my estate. For value received, without any relief from valuation or appraisement laws, with 6 per cent. interest from date until paid, and attorney's fees," is a promissory note, and not an attempted testamentary disposition of property.

SAME.—*Decedents' Estates.*—*Filing Note as Claim Against.*—*Pleading.*—It is sufficient to file a note, executed by a deceased person, as a claim against his estate, without any formal complaint.

SAME.—*Attorney's Fees.*—*Recovery of.*—The stipulation in the note for attorney's fees entitles the payee to recover them without any specific demand therefor.

SAME.—*Consideration.*—*Agreement of Parties as to.*—Where parties agree upon a consideration, and it is one of an indeterminate value, the courts will not substitute their judgment for that of the parties, but will uphold the contract.

SAME.—*Contract to Pay Member of Family for Services.*—Where there is an express promise to pay for services, an action will lie, although the promise be made to a member of the promisor's family.

From the Cass Circuit Court.

D. B. McConnell, R. Magee and S. T. McConnell, for appellants.

C. E. Taber, D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellee.

ELLIOTT, J.—The claim of appellee against the estate of

105	543
194	543
127	48
105	543
148	99
105	543
180	299

105	543
171	343

Price, Administrator, *et al.* v. Jones.

Benjamin Price, deceased, rests upon an account for boarding the deceased, and on an instrument executed by him reading as follows:

"\$2,000.

SEPTEMBER 18th, 1881.

"One day after my death, I promise to pay to the order of Nancy M. Jones two thousand dollars, to be paid out of my estate. For value received, without any relief from valuation or appraisement laws, with six per cent. interest from date until paid, and attorney's fees.

"BENJAMIN PRICE."

The appellants insist that the instrument is an attempt to make a testamentary disposition of property, and is destitute of all legal efficacy. We can not concur in this view. There is no attempt to make a testamentary disposition of property, for the instrument contains no provisions resembling those of a will. It is a promise to pay money. It differs from an ordinary promise in the single particular that it fixes the time of payment at a period subsequent to the promisor's death. It is, nevertheless, a promise to pay money, absolutely and at all events, to a person named, and it has, therefore, all the essential features of a promissory note. All the modern authorities agree that such instruments as the one before us are to be deemed the promissory notes of the persons by whom they are executed. Story Prom. Notes, section 27; 1 Daniel Negot. Inst., section 46.

This case is easily discriminated from *Moore v. Stephens*, 97 Ind. 271, for here there is an express promise to pay a specified sum of money, and it is made in the form of a contract which imports a consideration; while in that case there was no promise, but simply a direction to pay, after the death of the person by whom the instrument was executed, a specified sum of money to the beneficiary named.

It is sufficient to file a note executed by a deceased person as a claim against his estate without any formal complaint. *Pulley v. Perfect*, 30 Ind. 379; *Hathaway v. Roll*, 81 Ind. 567.

The appellants introduced evidence of admissions of the

Price, Administrator, *et al.* v. Jones.

appellee which tended to show that the note was intended to evidence a gift and nothing more, but, in view of the explanations given by the appellee, we can not regard these admissions as conclusive. Nor can we regard the testimony upon this point as uncontradicted, for there is evidence tending to prove that the intestate was old, infirm, and diseased; that he needed care and nursing; that he promised to pay for the care and nursing bestowed upon him, and that it was in the performance of this promise that he executed the note upon which the claim is founded.

It was for Benjamin Price, the appellant's intestate, to determine the value of the appellee's services. He, better than those who are claiming his estate, knew what those services were worth, and his judgment of what was a fair compensation ought not to be set aside or disregarded. The rule is, that where parties agree upon a consideration, and it is one of an indeterminate value, the courts will not substitute their judgment for that of the contracting parties, but will uphold the contract. *Johnson v. Gwinn*, 100 Ind. 466, see p. 472; *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491, see p. 492; *Shade v. Creviston*, 93 Ind. 591, see auth. cited p. 594; *Wolford v. Powers*, 85 Ind. 294 (44 Am. R. 16). In the case last cited, very many of the decisions are collected, and some of them are directly in point here, especially the cases of *Earl v. Peck*, 64 N. Y. 596, and *Cowee v. Cornell*, 75 N. Y. 91 (31 Am. R. 428).

The case of the appellee does not rest upon an implied promise, but upon an express one. Where there is an express promise to pay for services, an action will lie, although the promise was made to one of the promisor's family. The decisions cited by appellants, applicable to cases resting upon an implied promise, exert no influence upon such a case as this.

The appellee was not bound to make an express claim for attorneys' fees, for the stipulation in the note entitled her to

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recover them without any specific demand for them. The agreement to pay attorneys' fees is a part of the contract, and the appellee is entitled to recover according to its terms. *Hanna v. Fisher*, 95 Ind. 383; *Glenn v. Porter*, 72 Ind. 525. There was, therefore, no error in including the attorneys' fees in the verdict.

Judgment affirmed.

Filed March 9, 1886.

No. 12,531.

CARMODY ET AL. v. THE STATE.

RECOGNIZANCE.—Forfeiture.—Averments as to Amount of Bail and Officer Taking Same.—Uncertainty of Complaint.—Where, in an action on a forfeited recognizance, the averments of the complaint, as to the officer before whom the recognizance was entered into and as to the amount of bail which had been fixed in the cause, were too uncertain, but such averments, in connection with the copy of the recognizance filed with the complaint and the official endorsements upon it, show that the recognizance was entered into before the sheriff who arrested and had in custody the principal therein, and that the sum of \$1,000 was endorsed upon the warrant by the clerk who issued it, such complaint is sufficient on demurrer. Section 1684, R. S. 1881.

SAME.—Authority of Deputy to Act for Sheriff Presumed.—Defence.—In such case, the authority of a deputy to act for and in the name of the sheriff will be presumed. If in fact he had no authority to so act, it will constitute matter of defence.

SAME.—Continuing Recognizance.—Answer.—An answer in such case, alleging that the trial court made no order directing the sheriff to take a continuing recognizance, but failing to aver that the principal therein did not desire to enter into a continuing recognizance, is insufficient. Section 1713, R. S. 1881.

SAME.—Presumption of Desire to Execute Recognizance.—In the absence of allegations of duress or constraint, it will be presumed that the principal and sureties desired to enter into the recognizance to which their names are found attached, and the execution of which is admitted.

SAME.—Order Fixing Bail.—Return of Indictment.—An answer, averring that the trial court did not, on the return of the indictment or at any

Carmody *et al.* v. The State.

time afterwards, fix the amount of bail required of the defendant, but not averring that no such order had been made prior to the return of the indictment, is insufficient.

SAME.—*General Order of Court Fixing Amount of Bail During Term.*—*Exceptions.*—"Discriminating Judgment."—The right of a party charged with a felony to have a discriminating judgment exercised in determining the amount of bail in his particular case, does not restrain the courts from making a general order fixing the amount of bail which shall be thereafter required during a given term, in certain classes of bailable offences, and from enforcing such an order in all cases, except where the exercise of a discriminating judgment is by some means specially invoked, or some question is made upon the alleged injustice of its operation in a particular case.

SUPREME COURT.—*Judicial Notice.*—*Terms of Circuit Court.*—The Supreme Court takes judicial notice of the time when the terms of a circuit court begin.

From the Ripley Circuit Court.

J. G. Berkshire and *C. H. Willson*, for appellants.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, C. J.—This was an action by the State against Martin Carmody as principal in, and Christina Wehmeyer and Patrick Carmody as sureties upon, a forfeited recognizance.

Process was not served upon Martin Carmody, and there was no appearance by him to the action. The sureties answered in four paragraphs. Demurrers were sustained to all the paragraphs of answer, and, the sureties refusing to plead further, final judgment was rendered against them for the full penalty of the recognizance.

It is first claimed that the complaint was bad, and that, in consequence, the circuit court erred in sustaining demurrers to the several paragraphs of answer, upon the ground that it is error to sustain a demurrer to any answer to a bad complaint. It is next claimed that all the paragraphs of answer constituted good several defences to the action, and that, for that reason, the demurrers to all of the paragraphs ought to have been overruled.

The complaint charged that the grand jury of Ripley county,

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at the September term, 1884, of the Ripley Circuit Court, returned an indictment against Martin Carmody for defalcation; that a warrant was thereupon issued by the clerk of that court to the sheriff of Ripley county for the arrest of the said Carmody; that in pursuance of said warrant said sheriff arrested the said Carmody and took him into his custody; that afterwards, on the 11th day of November, 1884, the said Carmody, together with the said Christina Wehmeyer and Patrick Carmody, entered into a recognizance to the State of Indiana in the penal sum of one thousand dollars, conditioned that the said Martin Carmody should personally appear before the Ripley Circuit Court on the first day of the then next term thereof, and at each succeeding term of said court thereafter, to answer a charge of defalcation, and abide the order of court until said cause was determined, and not depart thence without leave; that said sheriff had full power and authority in that behalf; that said sum of one thousand dollars was endorsed on said warrant so issued to the said sheriff; that on the 5th day of December, 1884, being the seventeenth judicial day of the November term of the Ripley Circuit Court of that year, the said Martin Carmody was called to answer said charge of defalcation, but therein made default. Whereupon the recognizance entered into for his appearance, as above stated, was adjudged and declared to be forfeited.

The copy of the recognizance filed with the complaint had attached to it the following: "Taken and approved this 11th day of November, 1884. Thomas L. Hughes, Sheriff, by J. H. Borgstead, deputy."

The objections urged against the sufficiency of the complaint are:

First. That there was no averment that the amount of bail was fixed by either the Ripley Circuit Court or by the judge of that court.

Secondly. That it was not averred that the recognizance was entered into before the sheriff.

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Thirdly. That, conceding that the *addenda* attached to the recognizance supplied that omission, there was nothing from which Borgstead's authority to act as deputy for the sheriff could be inferred.

Section 1684, R. S. 1881, provides that "The court, on the first day of each term, must order the amount in which persons charged by an indictment or information are to be held to bail; and the clerk must enter such order on the order-book, and he must endorse the amount on each warrant when issued. The order may apply to informations to be filed in vacation. If no order fixing the amount of bail have been made, the sheriff may present the warrant to the judge of the circuit or criminal court, and such judge must thereupon endorse the amount of bail to be required," etc.

As regards the officer before whom the recognizance was entered into, and as to the amount of bail which had been fixed in the cause, the averments of the complaint were too uncertain to meet the requirements of good pleading, but, taking into consideration all the averments of the complaint, in connection with the copy of the recognizance with the official endorsements upon it, we think the fair inference was, and still is, that the recognizance was entered into before, and taken by, the sheriff, who arrested and had Martin Carmody in custody, and that the sum of one thousand dollars, endorsed upon the warrant, was endorsed upon it by the clerk who issued the warrant and indicated the amount of bail which had been properly fixed in the cause.

In a case like this, the authority of the deputy to act for, and in the name of, the sheriff, will be presumed, and if, in fact, he had no authority to so act, that circumstance constitutes a matter of defence. *Patterson v. State*, 10 Ind. 296.

We regard the complaint as having been substantially sufficient upon demurrer.

The recognizance in this case was what the statute denominates a "continuing recognizance," and the first paragraph of the answer averred that the Ripley Circuit Court made

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no order directing the sheriff to take such a recognizance. It failed to aver, however, that Martin Carmody did not desire to enter into a continuing recognizance, and for that reason, at least, the paragraph was insufficient as a defence. See section 1713, R. S. 1881.

The second paragraph averred that there was no order of court directing the sheriff to take a continuing recognizance, and that no desire on the part of Martin Carmody to execute such a recognizance was made known to the sheriff at the time the recognizance sued on was entered into. But there was no averment that the parties did not voluntarily consent to the execution of the recognizance into which they entered, and in the absence of an averment of duress or constraint, it will be presumed that Martin Carmody, as well as his co-obligors, desired to enter into the recognizance, to which their names are found attached, and the execution of which is admitted. *Harbaugh v. Albertson*, 102 Ind. 69.

The third paragraph set up the same matters contained in the second, with the additional allegations that the indictment upon which the warrant was issued was returned on the 20th day of September, 1884, and that, at no time after that date, did either the Ripley Circuit Court, or the judge thereof, fix the amount of bail which should be required of the defendant, Martin Carmody, for his appearance to answer said indictment.

We take judicial notice of the fact that the term of the Ripley Circuit Court, at which the indictment was returned, began on Monday the 1st day of September, 1884. Some order may, therefore, have been made previous to the return of the indictment, which had the effect of fixing the amount of bail to be required in that case. For this reason the paragraph was bad for not averring that no previous order had been made which fixed the amount of bail upon the indictment in question.

The fourth paragraph alleged that the Ripley Circuit Court,

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on the first day of its September term, 1884, made and caused to be entered of record an order as follows :

“Ordered that until the commencement of the next term of this court, in all felonies under the grade of murder in the second degree, and above petit larceny, the bail shall be one thousand dollars. In cases of petit larceny, three hundred dollars. Misdemeanors punishable by fine and imprisonment, two hundred dollars. Misdemeanors punishable by fine only, one hundred dollars. Bastardy, five hundred dollars.”

That the indictment against Martin Carmody was not returned into court until the 20th day of September, 1884; that thereafter no order of bail in reference or as applicable to that particular indictment was made; that the clerk, who issued the warrant for the arrest of Martin Carmody, endorsed one thousand dollars on said warrant as the amount of bail required, upon the assumption that he was authorized to do so by the general order fixing the amount of bail herein set out, and not otherwise.

It is argued that a general order fixing the amount of bail can not be made applicable to indictments thereafter to be returned; that the constitutional inhibition against requiring excessive bail necessarily involves an inquiry into the attending circumstances and peculiarities of each particular case, with reference to the amount of bail which ought to be required, and that the necessity of such an inquiry excludes the idea that a general order may be made in advance fixing the amount of bail in all of a particular class of cases at a uniform sum.

Cooley, in his treatise on Constitutional Limitations, at page 378, 5th edition, says: “That bail is reasonable which, in view of the nature of the offence, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party’s attendance. In determining this, some regard should be had to the prisoner’s pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent

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to a denial of right if exacted of a poor man charged with the like offence."

The doctrine of this extract, and the consequent right of a party charged to have a discriminating judgment exercised in determining the amount of bail which ought to be exacted in his particular case, were argumentatively and generally recognized in the case of *Gregory v. State, ex rel.*, 94 Ind. 384 (48 Am. R. 162), but the right thus recognized does not restrain the courts from making a general order fixing the amount of bail which shall be thereafter required during a given term, in certain classes of bailable offences, and from enforcing such an order in all cases, except where the exercise of a discriminating judgment is, by some means, specially invoked, or some question is made upon the alleged injustice of its operation in a particular case. *Votaw v. State*, 12 Ind. 497; *Myers v. State*, 19 Ind. 127; *Hawkins v. State, ex rel.*, 24 Ind. 288; *Gachenheimer v. State*, 28 Ind. 91.

The judgment is affirmed, with costs.

Filed March 9, 1886.

No. 11,445.

PUGH ET AL. v. PUGH ET AL.

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134 546
135 297
105 553
142 161

WILL.—Construction.—Intention.—Evidence.—In the construction of a will, it is the duty of the court to ascertain the intention of the testator, but this must be shown in some way by the will itself, and not wholly by outside facts.

SAME.—Word "Children" Does not Signify "Grandchildren."—Where a bequest is given by will to the children of a person, the word "children" must be understood in its primary signification, where there are persons living at the date of the will, or when the bequest takes effect, answering such meaning of the term, and in such case it will not include grandchildren.

From the Fayette Circuit Court.

F. J. Hall, for appellants.

B. L. Smith and *W. J. Henley*, for appellees.

Pugh et al. v. Pugh et al.

Howk, J.—The record of this cause shows that Mary Harlock, late of Fayette county, died testate on the — day of April, 1881. Her last will was dated and duly executed by her, on the second day of August, 1879. The third item or clause of her will reads as follows:

“*Thirdly.* The residue of my estate (after paying expenses of administration), real, personal and mixed, I request my executor and hereby direct him to loan at interest, on such time and terms as he may direct or deem prudent, and, after deducting taxes and expenses, to pay the residue of the interest thereon annually to my grandson, Thomas A. Taylor, during his natural life; and should my executor at any time deem it prudent, he may, and is hereby authorized to pay the principal and interest to said Thomas A. Taylor, or my executor may, if he deems best, invest the same in real estate for said Thomas A. Taylor; and should said Thomas A. Taylor marry and have issue living at his death, if the same has not previously been paid to said Taylor, or invested in real estate, then and in that event the same be paid to said child or children of said Taylor. But should said Taylor die without issue, then and in that event the same be paid one-half to the children of my sisters, Eliza A. Helm (now dead) and Catharine Stewart, that is to say, one-half to the children of Eliza A. Helm, and one-half to the children of Catharine Stewart.”

Thomas A. Taylor, the grandson of the testatrix named in the third item or clause of her will, departed this life on the 26th day of June, 1882, intestate, unmarried and without issue. Catharine Stewart, named in testatrix's will, died April 10th, 1882. At the date of the last will of the testatrix and at the date of her death, Catharine Stewart had only two living children, namely, William A. Pugh and Sophia Sickles, who are still living and are the appellees in this cause. Catharine Stewart also had, at the dates of the will and of the death of the testatrix, a number of grandchildren, the children of her deceased children who had died

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many years before the date of the testatrix's will. These grandchildren of Catharine Stewart are yet living, and are the appellants in this cause.

Upon the foregoing facts, the trial court decided that the appellees, who were the only living children of Catharine Stewart at the date of the execution of Mary Harlock's will, were entitled, under the third item or clause of such will, to the one-half of the residue of the testatrix's estate, to the entire exclusion of the appellants, as the grandchildren of Catharine Stewart, from any share or interest in such estate.

Appellants' counsel insists very earnestly, that the decision of the trial court is erroneous. Counsel claims that it was the manifest intention of Mary Harlock, in the event of the death of her grandson, Thomas A. Taylor, without issue, that the one-half of the residue of her estate should go to the children of the deceased children or grandchildren of Catharine Stewart, as well as to the children of the latter, who were living at the date of the execution of such will. If such were the intention of the testatrix, and we do not know that it was not, the writer of her will was very unfortunate in the selection of appropriate words to express such intention. In the construction of the will, it was the duty of the court to ascertain and carry into effect, if possible, the intention of the testatrix in regard to the matter under consideration; but this intention must be shown in some way by the will itself, and not wholly, at least, by facts outside of the terms of the will. This cardinal rule, in the construction of wills, has always been recognized in the decisions of this court. *Tyner v. Reese*, 70 Ind. 432; *Lofton v. Moore*, 83 Ind. 112; *Hinds v. Hinds*, 85 Ind. 312; *Downie v. Buennagel*, 94 Ind. 228.

Before the appellants could be permitted to share in the residuary bequest or legacy of Mary Harlock, it was incumbent on them to show from the will itself, that the testatrix intended that the grandchildren, as well as the children of Catharine Stewart, should be entitled to participate in such

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bequest or legacy. This they failed to do, and, indeed, can not do. The case in hand can not be distinguished in principle from the case of *Cummings v. Plummer*, 94 Ind. 403 (48 Am. R. 167). In the case cited, after a careful and thorough examination and citation of text-books and decided cases, it was held substantially that where a bequest or legacy is given by will to the children of a party, the word "children" must be understood in its primary or simple signification, where there are any persons in existence at the date of such will, or when the bequest or legacy takes effect, answering such meaning of the term; and that in such case, the word "children" will never denote or signify grandchildren. 2 Redf. Wills (2d ed.), p. 15; 2 Jarm. Wills, p. 690; and see the numerous authorities cited in 94 Ind. 403, on p. 407. We are of opinion that this is a correct statement of the law on the subject under consideration, and that it is decisive of the case at bar against the claim of appellants, the grandchildren, to share in the bequest or legacy to "the children of Catharine Stewart."

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed March 9, 1886.

No. 12,330.

HUNT v. DEDERICK ET AL.

CONTRACT.—*Agreement to Release Maker of Note.*—*Consideration.*—Where one parts with valuable property on the faith of an agreement by the payee of a promissory note, that if he does so the latter will release him therefrom, it is a sufficient consideration to uphold the agreement, although no benefit results to such payee.

From the Ohio Circuit Court.

J. B. Coles, for appellant.

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ELLIOTT, J.—The complaint of the appellees is based on three promissory notes, executed by the appellant and Lewis T. Cooper to Erastus S. Downey and by him endorsed to the appellees.

There are two paragraphs of the answer, but they are substantially alike, and we need give a synopsis of only one of them. The answer admits the execution of the promissory notes sued on, and contains these allegations: That the consideration for the notes was the sale and delivery of one "Dederick Hay Press" by Downey to the appellant and Cooper, as partners; that it was agreed by them that the appellant should transfer to Cooper his undivided interest in the press provided the owner and holder of the notes would release the appellant from all liability thereon, and look solely to Cooper for payment; that, in October, 1882, while the notes were still owned by Downey, and before the endorsement to the appellees, the appellant met Downey, stated to him the agreement that he, the appellant, had made with Cooper; that Downey then released the appellant from all liability on the notes, and agreed to accept Cooper as payor, "in consideration that the defendant should release and transfer his interest in said property to Cooper; that Cooper then assumed and agreed to pay the notes in full under the contract; that Downey then stated that he did not have the notes with him, and could not at that time take the defendant's name off;" that, relying on the contract with Downey, and "in consideration thereof, the defendant released and transferred his interest in said property, of the value of two hundred and fifty dollars, to Cooper, and delivered the same into his exclusive possession and ownership, without requiring security or indemnity from him."

The trial court erred in sustaining the demurrer to the answer.

The consideration for Downey's contract was not a past or executed one, for the agreement with Cooper was that if

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Downey would release the defendant from liability, then the latter would transfer his interest in the property for which the notes were given to his partner, Cooper. Where a party agrees to transfer property to a third person, in consideration that the holder of the notes given for the property will release the maker of the notes from all liability, and look to the person to whom the property is transferred for payment, the consideration for such an agreement is not an executed one. If, in this instance, the agreement between Cooper and the appellant had been made prior to Downey's agreement to release the latter, and the property had been previously transferred, it might be said that Downey's agreement rested on a past consideration.

There was a valid consideration for Downey's agreement to release the appellant from liability on the notes and accept his partner, Cooper, as the sole payor. On the faith of the agreement made by Downey, the appellant parted with property of the value of two hundred and fifty dollars, and this was a sufficient consideration although no benefit resulted to Downey. The rule is thus stated by a writer of recognized authority: "It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking." Addison Cont., page 6. It is hardly necessary to cite authorities upon this question, but we refer to a few of our own cases. *Strosser v. City of Fort Wayne*, 100 Ind. 443, *vide* p. 447; *Pitcher v. Dove*, 99 Ind. 175, *vide* p. 179; *Shade v. Creviston*, 93 Ind. 591, *vide* p. 595; *Glasgow v. Hobbs*, 32 Ind. 440; *Wolford v. Powers*, 85 Ind. 294 (44 Am. R. 16).

There is enough in the answers to drive the appellees to a reply.

Judgment reversed.

Filed March 12, 1886.

Sannes v. Ross et al.

No. 12,162.

SANNES v. ROSS ET AL.

105 558
159 625
152 630

ATTACHMENT.—*Taking Personal Judgment Equivalent to Dismissal.*—The rendering of a personal judgment against the defendant is equivalent to a dismissal of the proceedings in attachment.

SAME.—*Failure to Prosecute.*—*Action on Bond.*—*Evidence.*—Where, in an action on an attachment bond, the plaintiff, after introducing evidence of the proceedings in attachment and the seizure of his property thereunder, shows by the record that a final judgment in *personam* alone had been taken, he thereby shows that the attachment proceeding had been dismissed or abandoned.

SAME.—*Damages.*—Where either a dismissal or an abandonment of the attachment proceedings is thus shown, there is a failure to prosecute according to the condition of the bond, and evidence as to damages is admissible.

SAME.—*Complaint.*—*Sufficiency on Demurrer.*—A complaint on an undertaking in attachment, which avers the execution of the undertaking, the issuing of a writ, the seizure of the plaintiff's property, that the attachment was disposed of against the defendant, and that the latter did not duly prosecute the attachment proceedings, which, it is alleged, were wrongful and oppressive, resulting in damages to the plaintiff which remain unpaid, is good as against a demurrer. An averment that the undertaking was approved by the clerk before the writ issued is not necessary.

PLEADING.—*Uncertainty.*—*Practice.*—Mere uncertainty in a pleading can not be reached by demurrer. The objection must be made by motion.

From the Benton Circuit Court.

D. E. Straight, U. Z. Wiley and S. F. Carter, for appellant.
M. H. Walker and I. H. Phares, for appellees.

MITCHELL, J.—Joseph Ross commenced suit against John O. Sannes, on the 25th day of July, 1883, in the Benton Circuit Court, to recover the amount of certain promissory notes, and for goods sold and delivered.

Upon an affidavit and undertaking duly filed by Ross, a writ of attachment was sued out.

The case exhibited in this record is an action by Sannes against Ross and Phares, on the undertaking in attachment in the case above mentioned.

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The complaint recites the commencement of an action by the appellee against the appellant, the filing of the undertaking in attachment, setting out a copy, the issuing of a writ of attachment, and the seizure by the sheriff, in pursuance of the command of the writ, of certain described personal property alleged to belong to the plaintiff.

It is alleged that the attachment proceeding was disposed of at the September term, 1883, of the Benton Circuit Court, against the defendant. The breaches assigned are that Ross did not duly prosecute his proceedings in attachment, and that they were wrongful and oppressive, by reason of which damages had accrued to the plaintiff, which remained unpaid. Upon issues made upon this complaint a trial was had. The jury, under an instruction from the court, returned a verdict for the defendants. The only error presented is the overruling of the appellant's motion for a new trial.

A bill of exceptions discloses that the plaintiff put in evidence the pleadings, affidavit and undertaking in attachment, the writ, and the sheriff's return thereon, the order-book entries and judgment in the suit and attachment proceedings of Joseph Ross against John O. Sannes, in the Benton Circuit Court. It appeared from these, that upon the writ of attachment sued out, certain personal property belonging to Sannes had been seized by the sheriff, and that a personal judgment had been rendered in favor of Ross for \$372.62. The record is silent as to the disposition made of the proceedings in attachment. Except as it may be inferred from the rendition of a final judgment *in personam*, in the case pending, the record does not disclose the result of the issue made on the affidavit in attachment. The bill of exceptions recites that the appellant offered oral evidence to prove that the attachment proceeding had been dismissed by the plaintiff before the rendition of final judgment. This testimony was rejected. It also discloses that a motion was made in open court during the trial to correct the record in the attachment suit by a *nunc pro tunc* entry on the order-book,

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so as to show the dismissal of the proceedings in attachment, in correspondence with an entry to that effect on the court docket. This was denied.

The appellant offered testimony tending to prove the amount of damages sustained by the seizure of his personal property. This proof was also rejected. The court thereupon instructed the jury as follows:

"The court instructs you that there being no evidence in this case tending to sustain any issue in behalf of the plaintiff, your verdict must be for the defendant."

The court proceeded upon the assumption, that in order to maintain the action, it was essential that the record in the case in which the attachment was sued out, should show affirmatively and in terms, that there had been a final disposition of the proceedings in attachment. Upon that assumption, and because the record failed to show a judgment in respect to the attachment proceedings, proof of the amount of damages sustained was rejected, and the jury was peremptorily instructed to return a verdict for the defendant. This was error. In the case of *Smith v. Scott*, 86 Ind. 346, it was directly ruled that "The rendering of a personal judgment alone was equivalent to a dismissal or discharge of the proceedings in attachment." So, in the case of *Lowry v. McGee*, 75 Ind. 508, this court said: "The attachment proceedings presented an issue, and if there was no adjudication whatever of that issue, the taking of the personal judgment alone was an abandonment of the attachment lien, and the judgment stood as though no attachment proceedings had been commenced in the cause."

When, therefore, the appellant had introduced the pleadings, affidavit, undertaking, the writ, and the return thereon showing that his personal property had been seized under the writ, and when he had also shown by the record that a final judgment *in personam* alone had been taken in that case, he had thereby shown by the record that the attachment proceeding had been dismissed or abandoned. The pleadings in-

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troduced in evidence showed that the affidavit in attachment was denied. The record also showed that the appellant had in that proceeding claimed the benefit of the exemption law.

The final disposition of the case in which the attachment was pending, necessarily disposed of the attachment proceeding, and as the case resulted in nothing but the rendition of a personal judgment in favor of the plaintiff, it follows that the attachment was either dismissed or abandoned, and in either event there was a failure to duly prosecute the proceedings in attachment according to the condition of the bond.

It was not necessary that the record should have been corrected so as to show the dismissal of the proceedings in attachment. The parol evidence offered in support of the motion to supply the record on the order-book, and make it correspond with the judge's minutes, was immaterial as the case then stood, but it was error for the court to exclude the plaintiff's evidence on the subject of damages, and to give the instruction to the jury which was given.

The appellees have assigned cross errors which it is insisted are well taken and ought to prevent a reversal.

The error assigned brings in question the sufficiency of the complaint.

The objections urged against the complaint are, that it contains no sufficient averment of any breach in the undertaking, which is the foundation of the suit, and that it does not aver that the proceedings in attachment were quashed, dissolved or dismissed, or that there was ever any judgment rendered against the appellee in the attachment proceeding.

It is averred in the complaint that the attachment proceeding was disposed of against the appellee at the September term, 1883, of the Benton Circuit Court, and that there was a breach in the undertaking, in that the plaintiff did not duly prosecute his proceedings in attachment, and that they were wrongful and oppressive.

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It is said that this is the statement of a mere conclusion, and not the averment of any issuable fact.

The allegations of the complaint, in respect to the breaches assigned, are general in their character. The assignment, however, negatives the performance of the condition of the bond in the words of the contract. This was a sufficient assignment at common law. 1 Chitty Pleading, 332. The most that can be said of it is that it is uncertain. But it has often been decided that objections for defects in pleadings, that they are uncertain, or that they are too general in their statements, when they are otherwise sufficient, can not be reached by demurrer. *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160; *City of Evansville v. Worthington*, 97 Ind. 282, and cases cited.

The foundation of the action was the written undertaking. The complaint having averred the execution of the undertaking, the issuing of a writ, the seizure of the appellant's property, that the attachment had been disposed of against the appellee, and that the appellee did not duly prosecute the proceedings in attachment, which it is averred were wrongful and oppressive, resulting in damages to the appellant, which remained unpaid, it was good as against a demurrer. *Trentman v. Wiley*, 85 Ind. 33.

It was not necessary to aver in the complaint that the undertaking was approved by the clerk before the writ issued. If the appellee caused the appellant's goods to be wrongfully seized, as the complaint avers they were, it would not aid the appellee, even if the undertaking had not been approved in fact.

The record shows that exceptions were properly taken to the rulings of the court which are complained of. They are embraced in the bill of exceptions.

The judgment is reversed, with costs.

Filed March 11, 1886.

 Chapin *et al.* v. McLaren *et al.*

No. 11,553.

CHAPIN ET AL. v. McLAREN ET AL.

105	563
126	412
175	563
130	319

JUDGMENT BY CONFESSION.—*Affidavit of Debtor.*—A judgment by confession before a justice of the peace is valid as between the parties, without an affidavit by the defendant that he justly owes the debt, and void only as to creditors. Section 1490, R. S. 1881.

SAME.—*Knowledge or Consent of Creditor.—Ratification.—Attorney and Client.*—A judgment by confession in favor of a creditor, entered without his knowledge or consent, is void unless ratified by him; but knowledge and consent on the part of the creditor's attorney are sufficient.

SAME.—*Sheriff's Sale Under Satisfied Judgment Void.*—Where a judgment has in fact been fully paid and satisfied, a subsequent sale of real estate thereunder to any person having actual or constructive notice of such fact is void, and will pass no title.

From the Starke Circuit Court.

L. Ritter, E. F. Ritter and B. W. Ritter, for appellants.

J. D. McLaren, for appellees.

Howk, J.—In this case, the separate and several demurrers of each of the appellees to the complaint of appellants, the plaintiffs below, upon the ground that it did not state facts sufficient to constitute a cause of action, were sustained by the circuit court. Appellants excepted to this ruling, and have assigned it here as the only error, of which they complain.

Appellants, Gardner S. Chapin and James J. Gore, partners under the firm name of Chapin & Gore, alleged in their complaint that they were seized in fee simple of lot No. 47, in the original plat of the town of Knox, in Starke county, except the south ten feet thereof, and had been in possession thereof for four years last past, claiming title thereto as owners; that they derived title by virtue of a sheriff's deed executed October 28th, 1876, by the then sheriff of Starke county, and recorded in the proper record of deeds in the recorder's office of Starke county; that such deed was executed pursuant to a sheriff's sale of such lot, on October 23d, 1875, by virtue of two executions directed to such

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sheriff, issued out of the Starke Circuit Court on January 11th, 1875, upon two judgments of such court, at its December term, 1873, to wit, on December 30th, 1873, one in favor of William B. Taylor and Calvin H. Croninger, and the other in favor of John M. Kessan and others, and both against William W. Garver; and that such lot was sold by the sheriff as the property of William W. Garver.

Appellants further alleged that there was entered and docketed in the Starke Circuit Court, on the 9th day of October, 1873, a pretended judgment by confession for \$120.34, rendered by a justice of the peace of Starke county, on October 3d, 1873, in favor of the appellees McCauley & Co., and against William W. Garver, whereon one Joseph A. Garver was replevin bail; that such judgment, if valid, became a lien on such lot 47, on and after October 9th, 1873; that such judgment was void, because rendered without the consent of the plaintiffs therein, and because no affidavit of the defendant, Garver, was filed with such justice, that the claim was just and owing, and such confession was not made to defraud creditors; that, on April 3d, 1874, the justice of the peace issued an execution on such judgment to a constable of Starke county, to whom the defendant, Garver, on July 29th, 1874, paid the sum of \$40, and, on September 1st, 1874, the further sum of \$50, to be applied on such execution, and thereafter the constable returned such execution satisfied to the aggregate amount of \$90; that prior to the filing of their complaint, appellants were informed by William W. Garver that he had paid the full amount of such judgment to McCauley & Co. and had receipts to show it, but, on April 5th, 1882, he informed appellants that all, except two of such receipts had been burned up, and he was unwilling to swear positively to the fact of paying the balance, which was the first information appellants had of this fact, but they believed and charged the truth to be that such judgment had been fully paid.

Appellants further said, that, on August 16th, 1880, there

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was issued out of the Starke Circuit Court an execution on such confessed judgment, directed to the sheriff of Starke county and commanding him to collect the full sum of \$120.34 of William W. Garver, without any deduction for such payments, which execution was delivered to the then sheriff of such county; that by virtue of such execution, the sheriff levied on the above described lot, and, on October 20th, 1880, sold the same at public sale to appellee John D. McLaren, for the sum of \$193.54, that being the amount then claimed to be due on such judgment for damages and costs, without any allowance for the aforesaid payments, and afterwards, on the same day, gave to such purchaser the usual certificate of such sale, and John D. McLaren, as the attorney of McCauley & Co., receipted for said sum by taking such certificate; that John D. McLaren acted as the attorney of McCauley & Co. in taking the confession of judgment, in filing the transcript thereof in the Starke Circuit Court, in receiving all the moneys paid thereon by the defendant, Garver, in issuing such execution and bidding in and purchasing the aforesaid lot, but appellants were informed that he denied that such purchase was made in behalf of McCauley & Co.; that John D. McLaren, on December 10th, 1880, in his own behalf, assigned such certificate of sale to appellee Catharine Larrew; that McCauley & Co. had never been paid any part of such sum of \$193.54, or any consideration for such assignment; that appellee William Seagrove was then sheriff of Starke county, and appellee Catharine Larrew claimed that she was entitled to a sheriff's deed of the aforesaid lot, by virtue of the assignment to her of such certificate of sale, and sheriff Seagrove admitted that he was bound to execute such deed to her, and appellants feared that he would do so if not restrained by the court; and that appellees John D. McLaren and Catharine Larrew gave out and threatened to obtain such sheriff's deed, as soon as entitled thereto. Wherefore appellants prayed that the sheriff's sale of such lot to John D. McLaren be set aside and held for naught,

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and the execution quashed, that the judgment of McCauley & Co. be held void, or to be paid in full and satisfied of record; or, if the court should find such judgment to be valid and partly paid, then that the same be satisfied of record, on payment of the sum actually due thereon, and they offered to pay any such sum if the judgment should be held to be valid.

It is insisted on behalf of the appellants, in the elaborate brief of their learned counsel, that the facts stated in their complaint, the substance of which we have given almost in their own language, show that the sheriff's sale of the lot therein described to appellee John D. McLaren was illegal, and ought to be set aside, for the following reasons, namely:

"1. Because the judgment, upon which it was founded, was void, because rendered upon confession, without the necessary affidavit, as required by law.

"2. Because it was rendered without the knowledge or consent of McCauley & Co., in whose favor it was confessed.

"3. Because, prior to the issuing of the execution upon which the sale was made, the judgment had been fully paid and satisfied."

We will consider and pass upon these several reasons for setting aside the sheriff's sale of the lot to McLaren, or these several objections to the legality and validity of such sale, in their enumerated order.

1. In section 1490, R. S. 1881, in force since May 6th, 1853, in relation to a judgment by confession before a justice of the peace, it is provided as follows:

"Judgments may be rendered by confession, and no appeal shall lie therefrom; but the same may be collaterally impeached for fraud by creditors of the judgment debtor; and such judgment shall be void as to such creditors, unless at the time of the rendition thereof the defendant makes affidavit that he justly owes the debt."

In construing the provisions of this section of the statute, we have uniformly held that judgments by confession, before

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a justice of the peace, were good and valid as between the parties thereto, whether the defendant did, or did not, make affidavit that he justly owed the debt, and were void only as to creditors of the judgment defendant, for the want of such an affidavit. *Mavity v. Eastridge*, 67 Ind. 211; *Kennard v. Carter*, 64 Ind. 31; *Barnett v. Juday*, 38 Ind. 86; *Hopper v. Lucas*, 86 Ind. 43. In their long complaint in this case appellants have nowhere averred that they were or ever had been creditors, either precedent or subsequent, of William W. Garver, the judgment defendant. It is manifest, therefore, that appellants can not be heard to assert that the judgment by confession, upon which the sheriff's sale of the lot in controversy to McLaren was founded, was void for the want of the statutory affidavit by the judgment defendant, that he justly owed the debt. Appellants failed to show by the averments of their complaint that such judgment by confession was void as to them.

2. Appellants do not allege in their complaint that the judgment by confession was rendered "without the knowledge or consent of McCauley & Co." The allegation is that such judgment was rendered "without the consent" of McCauley & Co.; and this allegation is practically withdrawn and nullified by the subsequent averment in the complaint, "that said McLaren acted as the attorney of said McCauley & Co., in taking the confession of judgment," etc. Under this latter averment, it could hardly be said that McLaren did not know of and consent to the rendition of such judgment by confession. The knowledge and consent of McLaren, concerning the rendition of such judgment, were equivalent to the knowledge and consent of his clients, McCauley & Co. In *Haggerty v. Juday*, 58 Ind. 154, it was held that a judgment by confession, entered without the consent or knowledge of the creditor, in whose favor it is rendered, is wholly invalid, unless ratified by such creditor. In the case in hand, we are of opinion that appellant's complaint clearly shows that the judgment by confession was rendered with the knowl-

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edge and consent of McCauley & Co., acting by and through their attorney, McLaren. If this were not so, it is very clear, we think, that the complaint further shows, by its allegations in regard to the receipt by McCauley & Co., by and through their attorney, of the moneys collected by the constable on the execution issued on such judgment by confession, that the execution plaintiffs, McCauley & Co., had fully and effectually ratified and confirmed such confessed judgment.

3. The third and last reason assigned by appellants' counsel for setting aside the sheriff's sale to McLaren as illegal and invalid is, that prior to the issuing of the execution upon which the sale was made, the judgment had been fully paid and satisfied. It is not claimed that the alleged payment or satisfaction of such judgment was or is shown by the record thereof. It may be conceded, we think, that where an execution is issued upon a judgment which has in fact been fully paid off and satisfied, if the sheriff, by virtue of such execution, levy upon and sell real estate to any person having actual or constructive notice of such facts, the sale would be an absolute nullity. It was so held by this court in *State, ex rel., v. Salyers*, 19 Ind. 432, where it was said: "Indeed, the weight of authority seems to be, that a sale on a satisfied judgment will vest no title, even in an innocent purchaser." To the same effect, substantially, are the following cases: *Splahn v. Gillespie*, 48 Ind. 397; *State, ex rel., v. Prime*, 54 Ind 450; *Shields v. Moore*, 84 Ind. 440; *Merritt v. Richey*, 97 Ind. 236.

If it be true, as appellants charge, and appellees admit, as this case is presented here, that prior to the issuing of the execution, upon which the sale of the lot in controversy was made to McLaren, the attorney of McCauley & Co., the execution plaintiffs, their judgment whereon such execution was issued had been fully paid, then it must be held under our previous decisions, that such sale of the lot was an absolute nullity, and passed no title whatever to John D. McLaren or to his assignee, Catharine Larrew. It is averred in the com-

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plaint, and is admitted by appellees' demurrer, that McLaren as the attorney of McCauley & Co. received all the moneys paid on such judgment; and therefore it follows that he had actual notice of the fact averred, that the judgment had been fully paid. We are of opinion, for the third reason assigned as above by appellants' counsel, that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed March 10, 1886.

No. 12,111.

HOLMAN ET AL. v. THE STATE, EX REL. GIBSON, PROSECUTING ATTORNEY.

105	569
150	193

RAILROAD.—*Formation of Corporation.*—*Subscription to Stock.*—*Must be in Good Faith.*—*Ability to Pay.*—Under the statute providing for the formation of railroad corporations and requiring stock to the amount of at least fifty thousand dollars to be first subscribed, the subscriptions must be made in good faith, by persons who have a reasonable expectation of ability to pay.

SAME.—*Quo Warranto.*—*State not Concluded by Articles of Association.*—In a direct proceeding by the State, by *quo warranto*, against individuals who assume to act as a railroad corporation, requiring them to show cause for so acting, a showing by the defendants of the filing of articles of association and a subscription of the minimum amount of stock required by law is not conclusive upon the State.

SAME.—*Insolvency of Subscribers.*—*Forfeiture.*—Where it is established in such proceeding that the subscribers to a large part of the fifty thousand dollars of stock are insolvent, and were so at the time they subscribed, with no expectation of ability to pay, a forfeiture will be declared.

From the Huntington Circuit Court.

L. M. Ninde and T. E. Ellison, for appellants.

C. W. Watkins, L. P. Milligan and O. W. Whitelock, for the State.

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MITCHELL, J.—The State, by an information in the nature of a *quo warranto*, charged that William J. Holman and ten others were assuming to act as a corporation under the name of the Fort Wayne, Warren and Brazil Railway Company; that, as such corporation, they were making contracts, incurring debts, soliciting aid from townships, towns and cities, making surveys, appropriating lands, etc., without any warrant or authority of law. They were challenged to show by what authority they assumed so to act.

By a special answer the defendants admitted they were acting as a railway corporation, and alleged that they were duly organized and incorporated under the law. With their answer they exhibited a copy of their articles of association, which they averred had been duly filed in the office of the secretary of state. Upon the articles thus exhibited, it appeared that fifteen persons had each subscribed for \$3,400 of the capital stock, the whole amount of which was fixed at \$60,000.

A reply was filed admitting the signing and filing of the articles of association, and the subscription to the stock. It was, however, averred that many of the subscribers to the stock were, at the time of making such subscriptions, wholly and notoriously insolvent; and made no pretence of being able to pay their subscriptions, and that others of such subscribers were not worth half the amount subscribed by them; that the solicitor of the subscriptions and promoter of the corporation was a subscriber to the stock, was wholly and notoriously insolvent himself, and knew of the insolvency of many of the other subscribers; that one of the subscribers, in addition to being insolvent at the time of making his subscription, was also a minor, which was known to the promoters of the scheme. It was further charged that the capital stock had not been subscribed in good faith, but that the subscriptions were received for the purpose of securing a colorable organization to be made on paper. Evidence was

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offered tending to prove the averments contained in the reply. A judgment of forfeiture was rendered.

The statute providing for the organization of railroad corporations enacts, in substance, that whenever stock to the amount of at least \$50,000, or \$1,000 for each and every mile of the proposed road shall have been subscribed, any number of the subscribers not less than fifteen may, under certain regulations prescribed, form a railroad corporation.

The question presented for consideration is, must the \$50,000 of stock, which is required to be subscribed as a condition precedent to the organization, be subscribed in good faith by persons who had a reasonable expectation that they will be able to pay, or will subscriptions, some of which are merely simulated, fulfil the purposes of the statute?

Where the information is against the corporation *eo nomine*, an inquiry such as that proposed can not be made. In such a case, the bringing of the suit against the corporation in its corporate name is an admission of its corporate existence, and it is not necessary for the corporation to show that it had performed the conditions precedent to its corporate existence. High Extra. L. Rem., section 661. So, also, where the question of the regularity of the organization is made in a collateral proceeding, it is not admissible to show the insolvency of subscribers to the stock. It was accordingly held in *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51, that, in a suit upon an unconditional subscription of stock, evidence of the insolvency of some of the subscribers was immaterial.

There are cases which hold that an assessment against a subscriber to stock can not be collected until, at least, the minimum amount required by the statute has been subscribed by persons apparently able to pay for the shares subscribed. In such cases, the subscriptions of insolvent persons, infants and married women are not counted. *Lewey's Island Railroad Co. v. Bolton*, 48 Maine, 451; *Phillips v. Covington, etc., Bridge Co.*, 2 Met. (Ky.) 219; *Morawetz Corp.*, section 279; *Pierce Railroads*, p. 55, and notes.

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The fact that some of the subscribers to the stock of a corporation became insolvent after such subscriptions were made, will not of itself support an information in the nature of a *quo warranto*. *State, ex rel., v. Bailey*, 16 Ind. 46.

The case before us is an information by the State challenging the right of certain individuals to act as a corporation, and asserting that by reason of the colorable character of the subscriptions they never became an incorporation. It is therefore a direct inquiry on behalf of the State, calling upon the individuals named to show by what authority they assume to act as a corporation.

In such a case, while it may be sufficient, *prima facie*, to show the filing of articles of association and a subscription of the minimum amount of stock required by law, we do not think such showing is conclusive upon the State. It is true the statute does not in terms prescribe that the subscriptions must have been made in good faith, or that the subscribers must have been at the time of making their subscriptions solvent, and apparently able to pay.

But it must be implied, that, at least between the State and the persons to whom the privilege of erecting themselves into a corporation is granted, good faith and fair dealing should be observed.

Merely simulated subscriptions, made by persons who are neither actually nor apparently able to pay the amount subscribed, can not answer the purpose of the statute. Such subscriptions are shams, and are to be denounced as a fraud upon the law. They are an attempt to acquire corporate functions, not by a compliance with the law, but by a disingenuous evasion of it. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242.

Such subscriptions must stand upon the same basis, and be determined upon the same considerations, that govern any other business transaction.

It can not be doubted that a person may in good faith become a subscriber to the stock of a corporation, as he may

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become the purchaser of goods, for a sum larger than he is then able to pay, and more than he is at the time actually worth in property. But such a subscriber must have subscribed in good faith, with a reasonable expectation and an apparent prospect of being able to pay assessments on his stock as they might thereafter be called for.

Where, however, a subscriber is both insolvent and has no prospect or expectation of being able to pay, and such subscription is taken with knowledge, it can not be counted in making up the minimum required by statute.

When articles of association were tendered with a subscription of \$50,000 to the capital stock by fifteen persons, it was a representation that that amount was pledged and available as necessity might require. Upon the faith of that representation the State authorized the persons making it to assume the functions and franchises of a corporation.

On the same principle that one individual may reclaim his property which has been sold to another, who is insolvent, and who had at the time no intention to pay, or prospect of being able to pay for it, the State may reclaim the privilege granted by it under like circumstances.

Standing by until important interests were acquired by the corporation might estop the State, or lapse of time might cure the defect in the organization. *State, ex rel., v. Gordon*, 87 Ind. 171. Nothing of that kind is either pleaded or proved in this case.

It is abundantly established by the evidence that most of the subscribers to the stock had not only neither the ability, actual or apparent, at the time they subscribed, to pay any calls; but it appears further that they had no purpose or expectation that they would be called upon to pay, or that they could pay anything if called upon.

As a condition to its assent to the grant of corporate powers to a railway company, the State requires that an available capital of at least \$50,000 shall be provided as a security for persons with whom the corporation proposes to transact busi-

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ness, and as a guaranty that it will prosecute the proposed work. If obtaining merely feigned subscriptions puts it beyond the power of the State to withdraw its assent, then it is within the power of designing persons to obtain the franchise of a corporation by a merely pretended compliance with the law, and by that means exclude others who might execute a beneficial public improvement, while the existing corporation is wholly unable to do anything except to harrass those who may be induced to deal with it.

We think the evidence sufficiently shows that the defendants held themselves out as a corporation.

The judgment is affirmed, with costs.

ZOLLARS, J., did not participate in the decision of this case.

Filed March 12, 1886.

No. 12,267.

KURTZ v. CARR, ADMINISTRATOR.

FORMER ADJUDICATION.—*Conclusiveness of Judgment.*—A judgment is conclusive as to all matters which were or might have been litigated in the action, and a bar to any further litigation upon the same cause of action, between the same parties or those claiming under them.

SPECIAL FINDING.—*Exception to Conclusion of Law Admits Correctness of Facts.*—By excepting merely to the conclusions of law upon a special finding of facts a party admits that the facts have been correctly found.

From the Carroll Circuit Court.

W. F. Hays, for appellant.

A. W. Reynolds and E. B. Sellers, for appellee.

HOWK, J.—This was a verified claim filed by the appellant, Kurtz, in the clerk's office of the White Circuit Court, against the appellee Carr, administrator *de bonis non* of the

106	574
130	94
106	574
131	106
138	526
106	574
143	57
106	574
150	103

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estate of Benjamin D. Pettit, deceased. Afterwards, such claim not having been allowed by the appellee at the time prescribed by law, it was duly transferred to the issue docket of the White Circuit Court for trial; and thereupon, on appellant's application, the venue of the cause was changed to the court below. There, the parties appeared, and appellant filed a second paragraph of his verified claim. The cause being at issue was tried by the court, and, at the request of the parties, the court made a special finding of facts, and thereon stated its conclusions of law in favor of the appellee, the defendant below. Over appellant's exceptions to the conclusions of law, the court rendered judgment against him for appellee's costs.

In this court, several errors have been assigned by the appellant upon the record of this cause; but, in the outset of his brief, his counsel says: "The appellant rests his appeal upon his exceptions to the finding of facts, and the conclusions of law as found by the court." We shall consider this case, therefore, as it is presented by the special finding of facts, and decide the question whether or not the trial court erred in its conclusions of law. The facts found by the court were substantially as follows:

It is found that, on the 13th day of September, 1876, one Cormacan Hays conveyed to said Benjamin D. Pettit, then in life, by warranty deed, for the expressed consideration of \$25,890, certain lands in White county, Indiana, containing five hundred and eleven and one-half acres, which deed was dated August 1st, 1876, but was not delivered until September 13th, 1876; that, on the day last named, Benjamin D. Pettit executed to Cormacan Hays his written promise as follows:

"BROOKSTON, Sept. 13th, 1876.

"I hereby assume and agree to pay the sum of twenty-one thousand and eighty-one dollars, as follows, to wit: The sum of fourteen thousand dollars to the heirs of John Richey, deceased; thirty-seven hundred and seventy-five dollars to the Second National Bank of Lafayette, Indiana; fifteen

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hundred and six dollars to the Lafayette Savings Bank; and eighteen hundred dollars to George Chamberlain. Should Cormacan Hays pay me the above amounts, with the interest thereon at the rate of ten per cent. per annum, within three years from this date, or cause the same to be paid, then I bind myself, my heirs and administrators, to make the said Cormacan Hays a good and sufficient deed to a certain tract of real estate contained in a deed of said Hays to Benjamin D. Pettit, dated August 1st, 1876.

“(Signed) B. D. PETTIT.”

In July, 1883, Cormacan Hays assigned this writing obligatory to the appellant, by endorsement thereon in these words: “Lafayette, Ind.—I hereby assign the within contract to Charles Kurtz. (Signed) C. HAYS.”

It is found that, on the 13th day of September, 1876, Cormacan Hays was indebted to the Lafayette Savings Bank in the sum of \$4,300, with interest thereon from October 29th, 1875. This indebtedness was evidenced by a promissory note, dated October 29th, 1875, executed to such savings bank by Hays, as principal, and Charles Kurtz, Benjamin D. Pettit, Joseph H. Krom and Samuel H. Powell, as sureties. Powell was then insolvent, and suit had been instituted on such note. On the 26th day of November, 1876, Kurtz, Pettit and Krom paid the interest due on such note and costs accrued in the pending suit, and each in payment of such note executed his separate note to the savings bank for the sum of \$1,433. These notes became due six months after November 26th, 1876, and Kurtz, Krom and Pettit each paid his note when due. And it is found that the sum of \$1,506, which Pettit assumed and agreed to pay to such savings bank, embraces and constitutes the one-third of such note of \$4,300, together with one-third of the interest due thereon and one-third of such costs, and that Pettit fully paid the sum which he thus assumed to pay to such savings bank. It is further found that, at the time of the execution of the aforesaid agreement, Hays was indebted to George Chamberlain

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in the sum of \$1,800, with interest, evidenced by a joint promissory note executed by Hays, as principal, and Pettit as surety. On the 14th day of February, 1877, Chamberlain commenced an action upon such note, in the White Circuit Court, against Hays and Pettit. On the 27th day of February, 1877, Pettit conveyed to Chamberlain forty acres of land at the agreed price of \$1,000, for which Chamberlain agreed to release Pettit from any further liability on such note, and, on the next day, dismissed his action as to Pettit, and, Hays not appearing, judgment by default was rendered against him for \$2,058.87 and costs of suit. This judgment was rendered pursuant to the agreement between Pettit and Chamberlain, and it was further agreed between them that if Chamberlain should succeed in collecting his judgment against Hays, he would repay to Pettit the sum of \$1,000, the agreed price of such land.

It is found that Hays was ignorant of the agreement between Pettit and Chamberlain, at the time it was made and at the time such judgment was rendered, and the evidence does not disclose the time when Hays first acquired knowledge of such agreement and of such payment of \$1,000. This judgment against Hays is still in force and remains unpaid. Chamberlain assigned the judgment to the plaintiff, Kurtz, in August, 1883, receiving therefor \$300. At the time this agreement was made between Pettit and Chamberlain, the latter was ignorant of the agreement between Hays and Pettit, whereby Pettit had agreed to pay such indebtedness.

It is further found that, on the 27th day of October, 1882, Hays filed his claim in the White Circuit Court against John P. Carr, administrator of the estate of Benjamin D. Pettit, deceased. His claim or complaint was in three paragraphs.

In the first paragraph Hays stated that, on September 13th, 1876, he conveyed by warranty deed to Benjamin D. Pettit the following described lands, to wit (description), containing 511½ acres, of the value of \$30,000, the consideration ex-

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pressed in such deed being, however, but \$25,890. Benjamin D. Pettit, on the day last named, in consideration of the execution of such deed, agreed with Hays to pay the sum of \$21,081 in the aggregate to certain individuals and banking corporations, and relieve Hays from all liability upon the same; that, in addition to the payment of such sum of money, Pettit agreed to insure to Hays the undisturbed and quiet possession of such lands, for at least three years from September 13th, 1876, and that he would supply Hays with 600 yearling steers, to be grazed and matured upon such lands and other lands then under Hays' control; and that, at the end of such three years, Pettit was to reconvey to Hays upon the payment of such sum of \$21,081, with interest; but that Pettit violated the terms and conditions, upon which such conveyance was made, in all their essential features; that, instead of paying off the sum of money he agreed and covenanted with Hays to pay off, he suffered judgment to be taken against Hays, and execution to issue for the possession of such lands, soon after the making of such deed, and a long time prior to the time when Hays was to yield possession, and that Pettit became an active participant in such suit for possession, by aiding Alice J. Elliott and Keltie McCoy, the heirs of John Richey, who were the holders of a mortgage upon such lands for the sum of \$14,000, which sum was one of the several sums assumed by Pettit to pay immediately upon the execution of such deed, and which indebtedness Pettit did not pay, but fraudulently sought to obtain title to such lands, and avoid the covenants under which he obtained his deed from Hays and wife, by procuring and permitting the sale of such lands, under a decree of foreclosure by said Elliott and McCoy, at the same time contracting and colluding with them and one Wilstach to put him, Pettit, in possession, and thereby evade the terms and conditions under which he took title to such lands from Hays; that, in consequence of such fraudulent collusion, Hays had been dispossessed of such land, and Pettit's representative then held possession; that no money or

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other consideration had been paid to Hays for such lands; that there was due to Hays, as damages, for breach of Pettit's contract, the sum of \$25,000, and for unpaid purchase-money for such lands the sum of \$25,890, with interest. Wherefore Hays demanded judgment for \$50,890.

In the second paragraph of his complaint Hays averred that he had conveyed such 511½ acres of land to Pettit, and in part consideration therefor Pettit executed such agreement, dated September 13th, 1876, assuming and agreeing to pay such several sums of money, amounting to \$21,081, a copy of such agreement being filed with and made part of such second paragraph; that such sum of \$14,000, mentioned as due to the heirs of John Richey, had been theretofore secured by a mortgage on such lands, which had been foreclosed prior to such conveyance; and that the residue of such sum of \$21,081 consisted of debts of Hays, evidenced by promissory notes executed by him with Pettit as his surety; that as an additional consideration for the conveyance of such lands, Hays was to retain the possession and enjoy the use thereof for three years from the time of the conveyance, and Pettit was to furnish him 600 head of yearling cattle, to be fed and grazed on such lands, and other contiguous lands, which would have yielded Hays a large profit. Hays charged that Pettit, in his lifetime, did not pay, and, since his death, his administrator had not paid, such sum of \$14,000, or any part thereof, to the heirs of John Richey, as stipulated in such written agreement of September 13th, 1876; but, on the contrary, Pettit, while yet living, suffered the lands conveyed to him by Hays to be sold on the decree foreclosing the mortgage thereon, given to secure the Richey debt, and suffered John A. Wilstach to purchase such lands and receive a sheriff's deed therefor under such foreclosure and sale, and actually participated in the proceeding whereby the title to such lands was so conveyed to Wilstach; that such sale occurred less than six months after Pettit's acceptance of such deed and his execution of such written agreement, and, by Pettit's procure-

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ment and within such three years, Wilstach recovered possession of all such lands, by virtue of his title obtained through such sheriff's sale; whereby Hays was wholly deprived of the possession and enjoyment of all such lands for the entire term of three years, to his damage \$30,000.

And the claimant Hays charged that the decedent, Pettit, did not in his lifetime pay, nor had his administrator, nor had any one for him or them, paid the sum of \$3,775 to the Second National Bank of Lafayette, Indiana, but the same remained a subsisting liability against the claimant, to his further damage \$6,000; that, in violation of such written agreement, Pettit in his lifetime, and, since his death, his administrator had failed to pay to the Lafayette Savings Bank such sum of \$1,506, which, by such agreement, Pettit assumed to pay, and the same remained a subsisting liability against Hays, to his further damage \$3,000; that Pettit in his lifetime did not pay, and, since his death, his administrator had not paid, to George Chamberlain the sum of \$1,800, as by his written agreement Pettit assumed and agreed to pay, nor any part thereof, but the same remained a subsisting liability against Hays, to his further damage \$4,000.

It was further charged in such second paragraph that Pettit did not furnish the cattle, to the damage of Hays \$30,000; and judgment was demanded for \$103,000.

In his third paragraph Hays alleged that he sold and conveyed such 511½ acres of land to Pettit, and in part consideration therefor Pettit executed to Hays such written agreement, assuming and agreeing to pay such several sums, amounting to \$21,081, a copy of which agreement was filed with and made part of such third paragraph; that the sum, which Pettit agreed to pay the heirs of John Richey, was secured by a mortgage on such lands, and the remainder of such \$21,081 comprised debts of Hays, evidenced by promissory notes executed by him with Pettit as his surety; that at the time of such conveyance Hays was occupying such lands for grazing cattle and raising crops; that Hays was ex-

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perienced in this business, but was without means with which to stock his farm, which was well known to Pettit ; that such lands were of the value of \$30,000, while the consideration expressed in the deed was only \$25,890 ; and that to induce Hays, with his wife, to execute such conveyance, and to accept from Pettit such written agreement, and as a further consideration for such deed by Hays and his wife, and as an inducement to Hays to execute such deed and accept such written agreement, Pettit verbally contracted and agreed with Hays that the latter should continue to occupy, and have the use and enjoyment of, all such lands so conveyed for the full term of three years next ensuing the 13th day of September, 1876, and that, within a reasonable time thereafter, he, Pettit, would furnish to Hays 500 yearling steers to be kept by Hays three years on the lands so conveyed, and on other lands controlled by Hays ; that as fast as the cattle were furnished Hays should mortgage them to secure the repayment of the money expended by Pettit in their purchase, with interest at the rate of ten per cent. per annum ; and that whatever should be realized upon the sale of such cattle, when matured and sold, over the amount of their purchase-money and such interest, should be the money of Hays as compensation for his care and management of such farm, and his skill and outlay in the tillage thereof, and in the management of the business incident to the maturing of such cattle ; and Hays said that such verbal contract or agreement was the only consideration for the execution by him and his wife of such deed to Pettit, and of the acceptance from Pettit of his written agreement, whereby he assumed to pay for Hays the aggregate sum of \$21,081.

It was further alleged that Pettit failed, neglected and refused to furnish cattle, and thereby Hays sustained damages. It was further alleged that among the debts so assumed by Pettit, the one described as "fourteen thousand dollars to the heirs of John Richey," was secured to John Richey in his lifetime by a mortgage on the identical lands so conveyed to

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Pettit; and that, prior to such conveyance, Alice J. Elliott and Keltie McCoy, daughters of John Richey, had become the owners of the mortgage and had obtained a judgment for the debt secured thereby, and a decree for its foreclosure and for the sale of such lands; that notwithstanding Pettit's agreement to pay this debt, he suffered such lands to be sold under such decree within less than six months after such lands had been conveyed to him, Pettit procuring John A. Wilstach to purchase such lands in trust for the above named daughters of John Richey; that Pettit also caused Wilstach to institute suit against Hays, and to dispossess him; and that, in such suit, Hays was put to great expense in the payment of costs and attorney's fees. Wherefore Hays demanded judgment for \$45,000.

The court further found that thereupon, at the same term, 1883, of the White Circuit Court, the defendant filed in such court his written motion to strike out of the second paragraph of such complaint all that part thereof which is enclosed in brackets, "unless (in the language of the motion) the plaintiff makes parties to this action Alice J. Elliott and Keltie McCoy, heirs of John Richey, the Second National Bank of Lafayette, Indiana, the Lafayette Savings Bank, and George Chamberlain," and upon such motion the record reads: "Which motion the court sustains, and the plaintiff excepts to the ruling of the court." No further action was had by such court on that motion, and the persons named were not made parties to the action. And thereupon such further proceedings were had that the defendant filed his answer, in one paragraph, denying each and every allegation in the complaint; and the issues being joined, the cause was submitted to the court for trial. And, on the 6th day of July, 1883, the court having heard the evidence, and the argument of counsel, found for the plaintiff, Hays, and assessed his damages in the sum of \$1,600; and afterwards, at the same term of the White Circuit Court, to wit, on September 3d, 1883, the court rendered judgment on such

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finding, in favor of Hays and against Pettit's estate, for the amount of damages assessed and costs of suit, which judgment was in full force and unpaid.

The court further found that the contract for the sale and conveyance of such five hundred and eleven and one-half acres of land, and the written promise of Pettit to pay such several sums of money, which were mentioned in the complaint of Hays, in his suit in the White Circuit Court, were the identical contract and promise stated in the appellant's complaint in this action.

Upon the facts so found, the trial court stated its conclusions of law as follows:

"1. That the plaintiff is not entitled to recover for the alleged failure and refusal of Pettit to pay such sum of \$1,506 to the Lafayette Savings Bank.

"2. That Hays sustained damages by reason of Pettit's failure to pay to George Chamberlain such sum of \$1,800, in the amount of \$2,652, which includes interest on such sum of \$1,800 to this date.

"3. But that such judgment of the White Circuit Court concludes the rights of the parties to this action, and is a bar to this action against the defendant.

"4. I therefore find for the defendant."

Appellant has not questioned, in this court at least, the special finding of facts. It is settled by our decisions that, by his exceptions to the conclusions of law, appellant has admitted that the facts of his case were fully and correctly found by the trial court, but claims that the court's conclusions of law, upon the facts so found, were and are erroneous. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, 74 Ind. 110; *Fairbanks v. Meyers*, 98 Ind. 92; *Helms v. Wagner*, 102 Ind. 385.

We are of opinion, however, that upon the facts specially found, the court did not err in its conclusions of law. It is clear from those facts that all the matters in issue, in the case in hand, might have been, and ought to have been litigated,

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tried and determined by the White Circuit Court, in the prior suit there pending, upon the same written agreement, of *Hays v. Carr, Admr, etc.*, whereof mention is made in the special finding of facts herein. In such a case, it has been uniformly held by this court from its organization, that the prior adjudication is a complete bar to any further litigation upon the same cause of action, by and between the same parties, or those claiming under them by assignment or otherwise. *Fischli v. Fischli*, 1 Blackf. 360; *Richardson v. Jones*, 58 Ind. 240; *Elwood v. Reymers*, 100 Ind. 504.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed March 11, 1886.

105 584
124 87

No. 11,445.

SCOTT v. SCOTT.

CONTRACT.—*Release of Claim Against Debtor.*—*Consideration.*—Where a creditor agrees to release a claim against his bankrupt debtor, in consideration that the latter will pay his other creditors a certain per cent. of their claims and procure a dismissal of pending bankruptcy proceedings, the consideration, in the absence of fraud or mistake, is a valid one.

SAME.—*Performance.*—*Pleading.*—To make such agreement available as a defence to an action by the creditor on the claim agreed to be released, the debtor must show that he has paid to the other creditors the per cent. agreed upon. A general averment that he "settled with them" is not sufficient.

SAME.—*Release.*—*Parol Evidence Admissible to Explain.*—A release, reading "I hereby release my claim for six hundred and thirty-seven and $\frac{7}{8}$ dollars, now in the hands of the assignee, against G— S—, bankrupt," may be explained, qualified or contradicted by parol evidence, and the circumstances under and the purposes for which it was executed may be shown.

From the Hancock Circuit Court.

J. A. New and *J. W. Jones*, for appellant.

C. G. Offutt and *R. A. Black*, for appellee.

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ZOLLARS, J.—Appellant brought this action to recover upon a promissory note executed by appellee. Two of the assigned errors are the overruling of appellant's demurrer to the second and third paragraphs of appellee's answer. Appellee embodied in and based the second paragraph of his answer upon the following written instrument, executed by appellant, viz.:

“JANUARY 13th, 1875.

“I hereby release my claim for six hundred and thirty-seven and $\frac{75}{100}$ dollars, now in the hands of the assignee, against George Scott, bankrupt.

E. H. SCOTT.”

The circumstances which led to the execution of this instrument, and the consideration therefor, are stated in that paragraph of answer substantially as follows: Upon his own petition, appellee was adjudged a bankrupt by the district court of the United States for the District of Indiana, in 1875. The note here in suit was included in the schedule which accompanied the petition. After the appointment of an assignee, appellant proved his claim against the estate of the bankrupt. While the estate was pending in court for settlement, appellant “agreed to and with the defendant, and to and with the other creditors of the said defendant, that in consideration that the said defendant would pay to his other creditors a certain per cent. upon his indebtedness to them, and would * * * procure a dismissal of said proceedings by said court, he, said plaintiff, would release and discharge him from the payment of said note. And in pursuance of said agreement, the said plaintiff then and there executed to the defendant a certain written release of said indebtedness, so evidenced by said note, and which release is in the following words and figures:” * * * Upon the execution of said release, and in consideration thereof, the defendant settled with his other creditors, and upon petition presented by him to said court, in which petition the plaintiff joined, in order to convince the court that appellee had settled with all of his creditors, the proceedings in bankruptcy were dismissed.

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Whether or not a presumption might be indulged that the release was given for a sufficient consideration, did the answer contain no averments upon the subject of consideration, is a question we need not here determine.

The pleader has undertaken to set out in full the conditions upon which the release was executed, and the consideration therefor. If in this attempt the facts stated are such as show that there was no consideration for the release, or that it was executed upon conditions that have not been kept and performed by appellee, the plea must fall before the demurrer directed against it.

It is argued by counsel for appellant, that the answer fails to show that the release was executed upon a sufficient consideration, in that it shows that no advantage accrued to appellant, and that neither appellee nor the other creditors suffered, or could suffer, any loss or inconvenience. Upon the hypothesis that the answer states specifically that the release was executed in consideration of appellee paying a stated amount to the other creditors, and procuring a dismissal of the proceedings in bankruptcy, we think it states a sufficient consideration, in the absence of mistake or fraud. In the absence of such agreement, appellee was not bound to pay to the other creditors the exact amount stipulated, and was not bound to procure a dismissal of the proceedings. He thus undertook to do something in consideration of the release by appellant. What he thus undertook to do, may have been of no benefit to appellant, and of but little inconvenience to him, and without actual damage. However that may be, the undertaking by appellee was a consideration, and there being no fraud or mistake, and the parties being competent to contract, they, and not the courts, must judge of the sufficiency of the consideration. When a party gets all he contracts for, he can not complain that the consideration is not a valuable one. *Wolford v. Powers*, 85 Ind. 294 (44 Am. R. 16); *Shade v. Creviston*, 93 Ind. 591; *Fleetwood*

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v. Dorsey Machine Co., 95 Ind. 491 ; *Laboyteaux v. Swigart*, 103 Ind. 596 ; *Chicago, etc., R. W. Co. v. Derkes*, 103 Ind. 520.

This paragraph of answer, however, is infirm, in that it does not aver that appellee undertook to pay to the other creditors any certain and fixed per cent. of their claims, and that he paid that per cent. The averments are, that in consideration that appellee would pay to his other creditors "a certain per cent." upon his indebtedness to them, and that upon the execution of the release "the defendant settled with his other creditors." It is not alleged in general terms even, that appellee settled with the other creditors by paying to them the per cent. agreed upon with appellant. For aught that appears, the terms upon which he settled with his other creditors were altogether different from those agreed upon with appellant, and without any reference at all to any uniform per cent. If appellee seeks to hold appellant to an arrangement by which he released a debt of over six hundred dollars without any money consideration, he must show that he has strictly performed his part of the undertaking. This he has not done in the answer, and hence the court below erred in overruling the demurrer thereto.

The third paragraph of the answer is defective and insufficient for like reasons. The demurrer to it should have been sustained.

We think, too, that the court below erred in sustaining appellee's demurrer to the third paragraph of appellant's reply, and in suppressing such parts of his depositions as tend to support it. That paragraph set up, substantially, the following facts: Appellant, upon his own petition, was adjudged a bankrupt, as stated in the answers. After he was thus adjudged a bankrupt, he was desirous of having the proceedings dismissed, and, upon his request, appellant undertook to assist him by buying up the claims against him, and entering a release of the same. Whether or not this release was upon partial payment is not stated. After these claims were thus bought up and released, appellee represented to appellant that

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he was unable to procure the dismissal of the proceedings in bankruptcy, unless he could procure from him the written release set out in the answer. In order to procure that release, appellee agreed that it should be used for the purpose only of procuring a dismissal of the proceedings; that it should not be considered a release of the debt which appellant had against him, as evidenced by the note, and that he would pay the note in full. Upon these representations and agreements, and upon none other, appellant executed the release.

If this reply be true, and that it is true is admitted by the demurrer, the release served its whole purpose when it was used, if it was so used, in procuring the dismissal of the proceedings in bankruptcy. It was not intended by either party to be a release of the debt evidenced by the note. On the contrary, the express agreement was that the note should remain in full force, and be paid in full. Appellee had set out in his answers the circumstances under which the release was executed, the purpose of it, and the consideration therefor. It would seem clear that appellant had the right to meet those statements, by averring in his reply the facts which he there set up. We think, too, that in any event appellant has the right to show the circumstances under which the release set out in the answer was executed, the purpose of its execution, the consideration therefor, and that it served its whole purpose when used in procuring the dismissal of the proceedings in bankruptcy.

The release upon which appellee relies is so similar to a receipt that we think the rules of evidence applicable to a receipt may here be applied to the release. A receipt may always be explained, controlled, qualified, or even contradicted by parol evidence. *Lash v. Rendell*, 72 Ind. 475. See, also, *Hight v. Taylor*, 97 Ind. 392.

We need not extend this opinion to notice other paragraphs of the reply, and other alleged errors discussed by counsel, as upon a remodelling of the issues, and a re-trial of the case, those questions may not be involved.

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For the errors of the court below already pointed out the judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to the court below to proceed in accordance with this opinion.

Filed Feb. 20, 1886.

No. 12,901.

WALTER v. THE STATE.

CRIMINAL LAW.—Grand Jury.—Empanelment.—Indictment.—Where the record discloses enough to authorize the inference that the grand jury were lawfully empanelled, that is sufficient on motion to quash an indictment.

INTOXICATING LIQUOR.—Selling Without License.—Indictment.—Where the indictment for selling without a license charges a sale on a certain day, to a certain person, of "intoxicating liquor, in a less quantity than a quart, to wit, one gill of lager beer, at and for the price of five cents," it sufficiently charges a sale in a less quantity than a quart *at a time*.

SAME.—Clerical Omission.—Where the indictment properly charges a sale of intoxicating liquor, the mere clerical omission of the word "liquor" after the word "intoxicating," in the part alleging that the defendant was not licensed, is not a fatal defect.

SAME.—Statute.—Repeal.—Section 2090, R. S. 1881, on the subject of selling without license, has reference to classes of business other than the sales of intoxicating liquors, and does not repeal section 5320, which has special application to such sales.

SAME.—Variance.—"Jack" and "John."—Where the indictment charges a sale to "Jack Murphy," proof that his right name is "John Murphy" does not constitute a variance.

SAME.—Former Jeopardy or Conviction.—Parol Evidence.—A former conviction, or a former putting in jeopardy, can not be proved by parol evidence alone, without laying the proper foundation for secondary evidence.

SAME.—The best evidence of the result reached at a former trial is the record, and parol evidence is merely for the purpose of identification.

From the Knox Circuit Court.

106	589
150	359
151	497
106	589
157	539

Walter v. The State.

H. S. Cauthorn and J. M. Boyle, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, C. J.—The record before us shows that the following proceedings were had in the court below on the 12th day of September, 1885:

“Now, on this day, come the grand jury of Knox county, and return into open court indictments numbered respectively, namely: 2590, 2591, 2596, 2597, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608 and 2609, each of said indictments being endorsed ‘a true bill,’ signed by C. Hollingsworth, foreman, and also signed by the prosecuting attorney, and said indictments are now examined by the court and marked filed by the clerk.”

The indictment known as No. 2608, omitting the formal conclusion, is, in words and figures, as follows:

“Knox Circuit Court, September Term, A. D. 1885. The State of Indiana v. Theodore Walter. Indictment for selling without license. The grand jurors of Knox county, in the State of Indiana, good and lawful men, duly and legally impanelled, sworn and charged, in the Knox Circuit Court of said State, at the September term for the year 1885, to inquire into felonies and certain misdemeanors, in and for the body of said county of Knox, in the name and by the authority of the State of Indiana, on their oath do present that one Theodore Walter, late of said county, on the 15th day of July, A. D. 1885, at said county and State aforesaid, did then and there unlawfully sell to Jack Murphy malt and intoxicating liquor, in a less quantity than a quart, to wit, one gill of lager beer, at and for the price of five cents, he, the said Theodore Walter, not then and there having a license to sell such intoxicating in a less quantity than a quart at a time.”

A motion to quash this indictment being first overruled, a trial by the court resulted in finding the defendant guilty as charged, in overruling a motion for a new trial, and in a judgment against the defendant upon the finding.

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It is first insisted that it is not sufficiently shown by the record that the grand jury was properly impanelled before returning the indictment, and that for that reason the motion to quash the indictment ought to have been sustained. But under the more recent decisions of this court, the record in this case discloses enough to justify the inference that the grand jury were lawfully impanelled. *Alley v. State*, 32 Ind. 476; *Powers v. State*, 87 Ind. 144; *Stout v. State*, 93 Ind. 150; *Epps v. State*, 102 Ind. 539; *Padgett v. State*, 103 Ind. 550.

It is next insisted that the indictment is materially defective in failing to aver that the sale was in a less quantity than a quart *at a time*; also, in its failure to charge that Walter had no license to sell intoxicating liquor.

In respect to the objection thus first made, the indictment is sufficient under the rules of pleading in criminal proceedings, recognized in the cases of *Arbintrode v. State*, 67 Ind. 267 (33 Am. R. 86), and *Mullen v. State*, 96 Ind. 304.

As regards the second objection, last above made, it is sufficient to say that, taking all the averments in the indictment into consideration, it is obvious that the words "such intoxicating," used in the concluding sentence, evidently refer to the *intoxicating liquor* previously charged to have been unlawfully sold, and that the failure to repeat the word "liquor," in that connection, was a merely clerical omission, not constituting a fatal defect.

It is still further insisted, that section 12 of the act of 1875, touching the sale of intoxicating liquors, known now as section 5320, R. S. 1881, under which this indictment was returned, has been superseded and impliedly repealed by the section of the act of 1881, known as section 2090, R. S. 1881, which reads as follows: "Whoever, by himself or agent, transacts any business or does any act without a license therefor, when such license is required by any law of this State, shall be fined not more than two hundred dollars

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nor less than five dollars," and that, on that account, the indictment ought to have been quashed.

It is a rule of statutory construction that a general statute, without negative words, does not repeal the particular provisions of a former statute on a special subject, unless the two statutes are irreconcilably inconsistent. *Potter's Dwaris* on Stat. 154; *Sedgwick Stat. Law*, 97; *Smith Com.* 879; *Brown v. County Commissioners*, 21 Pa. St. 37; *Omit v. Commonwealth*, 21 Pa. St. 426.

The statutes of this State on the subject of the sale of intoxicating liquors have always been, as they still are, special and exceptional. Section 5320 is, consequently, not inconsistent with, or repealed by, the subsequent enactment of section 2090, the provisions of which ought to be construed as having reference to classes of business other than the sale of intoxicating liquors.

At the trial, Charles Calloway was the principal witness for the State. He was recalled and also testified on behalf of the defendant, amongst other things, as follows: "I know Jack Murphy, and have known him for some time; his right name is John Murphy, but I always call him Jack Murphy, and have often heard others so call him, but can not say how he is generally called."

The rule fairly deducible from the authorities is, that if two names are taken promiscuously to be the same name in common use, though they differ in sound, there is no variance between them. Where two names are derived from the same source, or where one is an abbreviation or corruption of the other, but both are taken by common use to be the same, though differing in sound, the use of the one for the other is not a misnomer. 1 *Bishop Crim. Proc.*, sec. 689. Jack and Jock are ordinarily only diminutive names for John, and Jack, *prima facie* at least, stands for John. See *Webster's Dictionary*, latest edition, page 1759.

The evidence of Calloway, above set out, was nothing

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more than an affirmation of the *prima facie* inference that Jack Murphy was only another name for John Murphy. It was, therefore, not a misnomer to designate John Murphy as Jack Murphy, in the indictment in this case, as contended by counsel.

Calloway, as a witness on behalf of the defendant, further stated: "I did testify to the same facts and the same sale to Jack Murphy, on the said 15th day of July, 1885, of beer, on a trial in this court at the October term, 1885, of the State of Indiana against the defendant, Theodore Walter." No record or other evidence of any previous trial of the cause then in hearing was introduced, and on motion of the prosecuting attorney, entered before the close of the trial, this last named statement of Calloway was struck out and disregarded by the circuit court. It is claimed that the evidence, thus struck out and disregarded, tended to show that the defendant had previously been put in jeopardy on the same charge, and that hence such evidence was erroneously struck out and disregarded. This court held in the case of *Dunn v. State*, 70 Ind. 47, that the question as to whether a person on trial has been previously tried for the same offence, is a question of fact, to be determined partly by the record of the former proceeding and partly by evidence outside of the record. The evidence outside of the record, thus alluded to, has reference to the parol evidence necessary for the purpose of identification in such a case, and which can only be given in connection with the record. That case does not decide, and hence ought not to be construed as deciding, that either a former conviction, or a former putting in jeopardy, can be proven by parol evidence alone, without laying the proper foundation for secondary evidence.

The best evidence of the result reached at a former trial is the record presumably made of the trial when it was concluded. *Farley v. State*, 57 Ind. 331; *Peachee v. State*, 63 Ind. 399; *Felton v. Smith*, 88 Ind. 149 (45 Am. R. 454);

 Edwards, Trustee, v. Johnson.

Wharton Crim. Ev., sections 592, 593; Greenleaf Ev., vol. 1, section 457; vol. 3, section 36. For the reasons given, the circuit court did not err in striking out the reference made by Calloway to a former trial.

The judgment is affirmed, with costs.

Filed March 12, 1886.

105	594
137	304
105	594
145	032

 No. 9532.

EDWARDS, TRUSTEE, v. JOHNSON.

SHERIFF'S SALE.—*Mortgage.*—*Foreclosure.*—*Redemption.*—*Change in Law Relating to.*—*Liability for Rent.*—In 1875, H. mortgaged land to E. In 1878, J. recovered a judgment against H., on which the same land was sold, J. becoming the purchaser, and obtaining a sheriff's deed on March 25th, 1879, under which he went into possession. In July, 1879, E. obtained a decree foreclosing his mortgage, the land was sold thereunder, he becoming the purchaser, and receiving a sheriff's deed on September 27th, 1880, up to which time J. remained in possession. Action by E. against J. to recover for rent during the year for redemption.

Held, that the redemption law of March 31st, 1879, which was in force when the sale to E. was made, and which repealed by implication the act of 1861, governs, and that J. is liable.

SAME.—*Possession Subject to Modifications in Redemption Law.*—Persons who purchase or go into possession of lands, upon which there are subsisting encumbrances, do so subject to any modification in the redemption law which it is competent for the Legislature to make, respecting the contracting parties.

SAME.—*Vested Rights.*—*Constitutional Law.*—*Obligation of Contracts.*—There are no vested rights in the law generally, nor in legal remedies, and it is competent for the Legislature to make changes in these so long as they do not affect the obligation of contracts.

From the Grant Circuit Court.

A. Steele, R. T. St. John, W. H. Coombs, R. C. Bell and S. L. Morris, for appellant.

G. W. Harvey, for appellee.

Edwards, Trustee, v. Johnson.

MITCHELL, J.—In the year 1875, Harris and wife mortgaged a tract of land in Grant county, of which the former was owner, to Edwards. In February, 1878, Johnson recovered a judgment against Harris, sold the land on March 23d, 1878, to satisfy an execution issued on the judgment, he becoming the purchaser, and, no redemption having taken place, received a sheriff's deed on March 25th, 1879, and went into possession.

On July 17th, 1879, Edwards obtained a decree foreclosing his mortgage, and on this decree sold the land in September, 1879, he becoming the purchaser. On the 27th day of September, 1880, no redemption having taken place, Edwards received a deed and went into possession.

Johnson having remained in possession pending the year for redemption from the sale on the Edwards decree, the question is whether he is liable in an action for rent to Edwards.

The contention of the appellee is, that because his title under the purchase made by him, became absolute and vested on the 25th day of March, 1879, six days before the redemption law which took effect March 31st, 1879, came in force, the redemption law of 1861, 2 R. S. 1876, p. 220, is to be looked to in determining the question of his liability. Against this view the appellant insists that the act of March 31st, 1879, which was in force at the time the sale was made under his decree, and which remained in force pending the year for redemption, controls.

The difference between the redemption law of 1861 and that of 1879, as respects the question here involved, is, that under the law of 1861, the judgment debtor became primarily liable for the rent pending the year for redemption, regardless of whether he occupied the land himself, or whether another occupied in his right. While, under the act of 1879, the owner remaining in possession, or whoever occupied the land during such period, was to be regarded as the tenant of the purchaser, and liable to him for the reasonable rent.

Johnson having purchased the land upon an execution

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sale against Harris, and having acquired all of Harris' title under such sale, was in possession as owner when Edwards commenced proceedings to foreclose his mortgage. From the time that Johnson took possession under the deed, he occupied the same relation to the land in respect to his right to redeem from the Edwards mortgage that Harris previously stood in. His right to the land having as to Harris become absolute, the redemption law, so far as it related to the contract between Harris and Johnson had spent its force. The only question then is, was it competent for the Legislature to modify or change the redemption law so as to affect the rights and liabilities of persons owning or in possession of land covered by existing mortgages?

Persons who purchase or go into possession of lands upon which there are subsisting encumbrances, do so subject to the contingency that any modification which it is competent for the Legislature to make in the redemption law, as it respects the contracting parties, may also be made in respect to them. The inquiry, therefore, comes to this: Was it competent as between the mortgagor and mortgagee to make the modification of the redemption law of 1861, which resulted from the act of 1879?

This question, as it seems to us, is foreclosed by the exhaustive opinion in the case of *Bryson v. McCreary*, 102 Ind.

1. While it is true as it was there held, that the redemption law, as it stood at the time the Edwards mortgage was made, became a silent factor in the contract, it is also well settled, as was said in that case, "that there are no vested rights in the law generally, nor in legal remedies, and hence changes in these by the Legislature do not fall within the constitutional inhibition, unless they are of such a character as to materially affect the obligation of contracts."

After the fullest consideration concerning the scope and effect of the law of 1861, as compared with that of 1879, it was determined in that case that the redemption law of 1879 did not violate the obligation of existing contracts, that it

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did nothing more than provide a more efficient remedy for the enforcement of contracts, and that it was, therefore, not obnoxious to the constitutional objection, which was in that case, as in this, urged against it.

The act of 1879 was the only redemption law which was in force at the time of the sale on the Edwards decree, the act of 1861 having been repealed by implication. The right of redemption was governed by the law in force at the time the sale was made. This principle ruled the case of *Moor v. Seaton*, 31 Ind. 11. The facts in that case were, that Moor purchased school lands in 1854, paid part of the purchase-price, and made default as to the residue. By the law in force at the time of the purchase, the defaulting purchaser had a right to redeem at any time within one year after sale. Subsequently, the law was so changed that no right of redemption existed after the sale. The purchaser made default, and the land was sold. He offered to redeem within the year according to the law in force at the time of the purchase. It was held that the law in force at the time of the sale governed. *Patterson v. Cox*, 25 Ind. 261; *Butler v. Palmer*, 1 Hill, 324; *Taylor v. Stockwell*, 66 Ind. 505.

The conclusion follows that the redemption law of 1879 must be looked to in determining the rights and liabilities of the parties, and under that law the appellee was liable for the reasonable rents during the time he occupied the land pending the year for redemption from the sale under the Edwards decree.

The judgment is reversed with costs, with directions to the court below to sustain the demurrer to the appellee's special answer, and for further proceedings not inconsistent with this opinion.

Filed March 13, 1886.

Wallace v. Brooker.

No. 11,842.

WALLACE v. BROOKER.

PLEADING. — *Complaint. — Motion to Make Specific. — Occupying Claimant. —*

Where a complaint, under the occupying claimant law, seeks a recovery for improvements, described merely as "clearing and fencing, removing stones and putting the land in a state of cultivation," of the value of one hundred and fifty dollars, it is error to overrule a motion to make such complaint more specific.

From the Fulton Circuit Court.

J. Rowley and *H. Corbin*, for appellant.

E. Myers, for appellee.

ELLIOTT, J.—The appellee's complaint seeks to recover the value of improvements placed by him on land from which he was evicted by the appellant, and is founded on the occupying claimants' law. The improvements are thus described: "Clearing and fencing, removing stones and putting the land in a state of cultivation," and it is averred that the improvements were of the value of one hundred and fifty dollars. The appellant moved to make the complaint more specific, but this motion was overruled, and that ruling is assigned for error.

The court erred in overruling this motion. The appellant was entitled to a statement of the character and value of the clearing, and of the kind and amount of fencing, as well as a specific statement of what was done in the way of putting the land in a state of cultivation. We do not think it is necessary that the appellee should state the number of days he was engaged in the work, but we do think that it is necessary that he should separate his claim into items, and state the character of each item in general terms and give the value of it. A defendant has a right to a definite statement of the claim asserted against him. A great degree of particularity is not required, but the particulars of a claim composed of

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several items must be separately stated, so that the character and amount of each can be known.

Judgment reversed.

Filed Feb. 20, 1886.

No. 12,702.

HOCKETT v. THE STATE.

From the Marion Criminal Court.

J. E. McDonald, J. M. Butler, A. L. Mason, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, N. Williams, J. L. Thompson, and C. S. Holt, for appellant.

F. T. Hord, Attorney General, *A. C. Harris, W. H. Oalkins, C. Byfield and L. Howland*, for the State.

NIBLACK, C. J.—On the 25th day of July, 1885, William K. Thompson requested the Central Union Telephone Company, a corporation owning and controlling a system of telephone lines, and a telephone exchange, at the city of Indianapolis, in this State, to rent to him, and to place in position for his use, in the same building with its telephone exchange, a telephone, and to connect such telephone with the exchange. In response to that request the company entered into a written contract with Thompson to let him have the use of "one set of telephone instruments as per equipment noted on the back," that is to say, one hand telephone, one Blake transmitter, one magneto bell and one cell battery, and to connect them with its exchange. for his use, upon certain specified conditions, for which he agreed to pay the company \$10 per quarter, or \$3.33½ per month. The company placed the instruments in position as provided by the contract for the use of Thompson, and John E. Hockett, the appellant, acting as the division superintendent and general agent of the company at Indianapolis, afterwards demanded and received from Thompson rent for the use of such instruments at the rate of \$3.33½ per month, the amount agreed upon by the contract. Thereupon an information was filed against Hockett charging him with a violation of the provisions of the act entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation," approved April 13th, 1885 (Acts 1885, p. 227), in so demanding and receiving from Thompson rent for such telephonic instruments at a rate in excess of three dollars per month. Upon a trial the appellant was found guilty as charged, and was adjudged to pay a fine as for the commission of a public offence.

All the controlling questions, whether of law or of fact, involved in this appeal, were considered, discussed and decided in the case of *Hockett v. State*, ante, p. 250, known as the Haughey case, and upon the authority of that case the judgment in this case is affirmed, with costs.

Filed March 3, 1886.

Lockwood v. Chambers *et al.*

No. 12,442.

**WAYMIRE v. THE BOARD OF COMMISSIONERS OF JASPER
COUNTY ET AL.**

From the Jasper Circuit Court.

E. P. Hammond, for appellant.

F. W. Babcock and *S. P. Thompson*, for appellees.

MITCHELL, J.—The appellant presented an itemized claim for thirty-eight dollars and eighty cents to the board of commissioners of Jasper county, of which he was a member.

The claim purported to be for services voluntarily rendered in attending, without subpoena, the trial of a lawsuit against the county, procuring witnesses on its behalf, and for time and money expended in that connection. The claim was allowed by the board, the claimant being at the time of such allowance a member, and the presiding officer of such board.

An appeal was duly perfected to the circuit court from the order of allowance. In the circuit court a motion was made to dismiss the appeal. This was overruled. Such further proceedings were had as resulted in the dismissal of the claimant's suit by the circuit court, at the appellant's costs. From this an appeal is prosecuted.

The case is in no way distinguishable from *Waymire v. Powell*, *ante*, p. 328, and upon the authority of that case the judgment of the circuit court is affirmed, with costs.

Filed Feb. 11, 1886.

No. 12,307.

LOCKWOOD v. CHAMBERS ET AL.

From the DeKalb Circuit Court.

W. L. Penfield and *H. J. Shafer*, for appellant.

J. E. Rose, for appellees.

HOWK, J.—In this case, the same questions are presented for our decision, in substantially the same way, as those which were considered and decided by this court in *Lockwood v. Ferguson*, *ante*, p. 380. Upon the authority of the case cited, this case must be decided as that was decided. See, also, *Storms v. Stevens*, 104 Ind. 46, where the questions referred to are more fully considered.

The judgment is reversed with costs, and the cause remanded with instructions to sustain the demurrer to the complaint.

Filed Feb. 13, 1886.

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1. *Jurisdiction.—Commitment to Jail.—Habeas Corpus.—Collateral Attack.*—Where the circuit court, in a bastardy proceeding, having jurisdiction of the subject-matter and of the defendant, commits the latter to jail on a bench warrant for failing to cause the judgment rendered against him in such proceeding to be replevied, such judgment can not be collaterally attacked on *habeas corpus*. Section 1119, R. S. 1881. *Holderman v. Thompson*, 112
2. *Same.—Recognizance.—Continuance.—New Bond.—In Custodia Legis.—Voluntary Appearance.*—The fact that after the defendant in a bastardy proceeding has been recognized by a justice of the peace to appear in the circuit court, and the case is there continued from term to term without a new bond being required, does not release him from the custody of the law; and the further fact that he voluntarily appeared and was present at the trial, does not affect the jurisdiction of the court over him. *Ib.*
3. *Same.—Waiver by Relatrix.*—The relatrix in a bastardy proceeding can not waive anything which the law requires. *Ib.*
4. *Examination of Relatrix.—Waiver by Defendant.*—Where, at the hearing of a bastardy proceeding before a justice of the peace, the relatrix is not present and is not examined, but the defendant does not object to the hearing on that account and makes no effort to procure

her attendance, he will be deemed to have waived her examination at that hearing. *Unruh v. State, ex rel., 117*

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 13; SUPREME COURT, 4.

BOND.

See ATTACHMENT; RECOGNIZANCE.

BRIEF.

See SUPREME COURT, 1.

BURDEN OF PROOF.

See LIFE INSURANCE, 4.

CAPIAS AD SATISFACIENDUM.

See HABEAS CORPUS, 4.

CASES OVERRULED, MODIFIED, DISAPPROVED, ETC.

Musselman v. Musselman, 44 Ind. 107, disapproved. *Evans v. Evans*, 204

Indianapolis, etc., R. W. Co. v. Board, etc., 70 Ind. 385, criticised.

Board, etc., v. Center Township, 422

Frost v. Tarr, 53 Ind. 390, and *Lee v. Carter*, 52 Ind. 342, modified.

Wallace v. Long, 522

As to cases modified, see

Frank v. Grimes, 346

CATTLE-GUARDS.

See RAILROAD, 2.

CHANGE OF VENUE.

See ARGUMENT OF COUNSEL; COUNTY COMMISSIONERS, 3; CRIMINAL LAW, 16; DIVORCE; DRAINAGE, 22.

CHATTEL MORTGAGE.

Foreclosure.—Equitable Jurisdiction.—Trial by Court.—A suit to foreclose a chattel mortgage was of exclusive equitable jurisdiction prior to June 18th, 1852, and under section 409, R. S. 1881, the issues of law and fact in such case must be tried by the court.

Brown v. Russell & Co., 46

CITY.

Public Improvements.—Building Permits.—Validity of Ordinance.—Under section 3106, R. S. 1881, the common council of a city incorporated under the general law has power to enact an ordinance making it unlawful to erect a building within such city without first making application to the clerk of the board of public improvements.

Hasty v. City of Huntington, 540

CIVIL ACTION.

See DIVORCE; DRAINAGE, 22.

COLLATERAL ATTACK.

See BASTARDY, 1; DRAINAGE, 2, 6, 8; HABEAS CORPUS, 4; RECEIVER, 3, 8.

COMMON LAW.

See HUSBAND AND WIFE, 3.

CONDITION.

See LANDLORD AND TENANT.

CONSIDERATION.

See CONTRACT, 14, 16, 17; FAMILY SETTLEMENT, 1, 2; PROMISSORY NOTE, 7; WILL, 3.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 21; DRAINAGE, 17, 19 to 21; HUSBAND AND WIFE, 2; OFFICE AND OFFICER; SHERIFF'S SALE, 4, 5; TELEPHONE.

CONTEMPT.

1. *Direct Contempt.—What Constitutes.*—Disorderly conduct, insulting demeanor to the court, and a direct disobedience of its orders *in facie curiæ*, constitute a direct contempt. *Holman v. State, 513*
2. *Same.—Power to Punish.*—The power to punish for direct contempts is inherent in all courts of superior jurisdiction, and can not be created, destroyed or abridged by the Legislature. *Id.*
3. *Same.—Legislative Power to Require Judge to make Formal Charge.*—*Quere*, as to whether the Legislature has power to require the judge of a court of superior jurisdiction to make any formal or written charge of a direct contempt occurring in open court and in the presence of such judge. *Id.*
4. *Same.—Appeal.—Statement of Judge.*—In a proceeding for a direct contempt of court, where the matter takes place in the presence of the court, and the judge places in the record a statement of the occurrence as required by statute, the appellate court will accept such statement as true. *Id.*

CONTINUANCE.

See BASTARDY, 2.

CONTRACT.

See COUNTY COMMISSIONERS, 1, 5, 6; DRUNKENNESS; FAMILY SETTLEMENT; HUSBAND AND WIFE; INFANT; INTOXICATING LIQUOR, 2; LIFE INSURANCE; MASTER AND SERVANT, 5 to 9, 13; PARTNERSHIP, 3, 4; PROMISSORY NOTE; REAL ESTATE, ACTION TO RECOVER, 2; SHERIFF'S SALE, 1, 4, 5; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS, 3, 4; WILL, 1 to 4.

1. *Merger of Verbal Agreements in Written Contract.—Vendor and Purchaser.—Warranty of Machinery.*—Where the agent of a vendor verbally warrants machinery as a part of the preliminary negotiations for its sale, and a written contract of sale between the parties is subsequently executed, all previous verbal negotiations and agreements are merged. *Brown v. Russell & Co., 46*
2. *Same.—Notice of Breach of Warranty.—Continued Possession.*—Where it is provided in such contract that written notice of any breach, within "ten days of first use," of warranty shall be given by the vendee to the vendor, and that continued possession or use of the machine after the expiration of the ten days shall be conclusive evidence that the warranty is fulfilled to the satisfaction of the vendee, the failure of the vendee to give the notice or to deliver possession will defeat a defence to the recovery of purchase-money, founded on a breach of warranty. *Id.*
3. *Delay in Performance.—Damages.*—Where a contractor in good faith enters upon the performance of a contract, and incurs expense, the employer having notice of that fact, if such employer, either by an order or by negligently failing to perform an essential part to be performed by him, suspends the execution of the contract, upon a resumption and completion of the work under the contract, it will be implied that all loss necessarily occasioned by such suspension, of which the employer is at the time notified, shall fall upon him. *Louisville, etc., R. R. Co. v. Hollerbach, 137*
4. *Same.—Breach of.—Measure of Damages.*—Where, on account of a failure by the employer to perform preliminary work, which, under the con-

tract, he is required to perform, before the contractor can proceed with the work he is to perform under the contract, the latter is unable to proceed, and the work is suspended, to the injury of the contractor, without his consent, of which the employer has notice, such contractor, although he may have afterwards completed the work under the contract, may, in addition to the contract price, recover all his actual damage occasioned by such delay, including injury to tools, and interest at six per cent. for the period of the delay on all moneys invested in materials which he was bound to and did furnish, and in the labor necessary in furnishing the same. *Ib.*

5. *Same.—Instruction.*—In an action to recover the contract price for work performed under a special contract, and damages for a breach of the provisions of the contract by the employer, whereby the work was delayed, etc., where it appears that on account of the failure of the employer to do certain preliminary work necessary to be done by him, before the contractor could begin to perform his part of the contract, the latter was not able to so commence his work until after the time fixed in the contract for the completion of the work, an instruction, asked by the defendant, to the effect that if at such time the employer had not performed such preliminary work, and the contractor was not ready with materials to commence the performance of his part of the contract, the latter was under no obligation to hold himself in readiness to do the work, and that unless the jury believed that a new agreement was afterwards made the plaintiff could not recover, was correctly refused. *Ib.*

6. *Of Settlement.—Special Finding.—General Verdict.—Inconsistency.—Judgment non Obstante.*—Where a complaint declares upon a written instrument, signed by the defendant, setting forth that the parties had "settled all accounts in full up to date, November 27th, 1877, and balance due" the plaintiff \$804.21, a special finding by the jury that the defendant executed the instrument, and that he had paid nothing to the plaintiff since its execution, is inconsistent with a general verdict for the defendant on a cross complaint, setting up items of account against the plaintiff which accrued prior to the date of such instrument, and judgment should go accordingly.

Frank v. Grimes, 346

7. *Judgment.—Merger.*—A party can not present by piecemeal, in successive actions, claims which grow out of an indivisible, entire contract, and the judgment in the first action brought is a conclusive merger of all amounts due under or arising out of the contract prior to the bringing of such action. *Indiana, etc., R. W. Co. v. Koons, 507*

8. *Same.—Only One Action for Breach of Entire Contract.*—Where a contract, upon an entire consideration, stipulates for the performance of several acts in favor of the same person, at the same time, it is entire, and separate suits can not be maintained to recover for the failure to perform each several act. *Ib.*

9. *Same.—Former Adjudication.—Railroad.—Damages.—Dismissal.*—Where, in consideration of the conveyance of a right of way, a railroad company contracts with the land-owner to construct and maintain fences along such right of way and a crossing over the road, a judgment, in an action upon such contract, for damages for a failure on the part of the company to construct the crossing, is a bar to an action for a failure to construct the fences, although in the former action the plaintiff expressly dismissed and withdrew from the jury all claim for damages relating to the failure to construct the fences. *Ib.*

10. *Statute of Frauds.—Agreement to Make Child an Heir.—Part Performance.—Will.*—Where a childless husband and wife, in consideration that a young girl shall live with them until the death of both, in all re-

spects as their own child, and render such service as she is capable of doing, orally agree to make her their heir, and at their death, or at the death of the survivor, to will her the entire estate of which they are possessed, consisting at the death of the survivor of real estate, and also of personal property exceeding fifty dollars in value, the agreement is within the statute of frauds, and performance on the part of the girl will not take it out of the statute. *Frost v. Tarr*, 53 Ind. 390, and *Lee v. Carter*, 52 Ind. 342, modified.

Wallace v. Long, 522

11. *Same.—Services of Child.—Recovery on Quantum Meruit.*—Where services have been performed in consideration of property to be conveyed, if the contract is not enforceable by reason of the statute of frauds, the action is not on the special contract for damages, but on a *quantum meruit* to recover the value of the services. *Ib.*
12. *Same.—Measure of Damages.*—In such a case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages. *Ib.*
13. *Same.—Situation of Parties Considered in Estimating Value of Services.*—In estimating the value of the services, regard should be paid to the situation of the parties, and the nature of the services required or performed. *Ib.*
14. *Consideration.—Agreement of Parties as to.*—Where parties agree upon a consideration, and it is one of an indeterminate value, the courts will not substitute their judgment for that of the parties, but will uphold the contract. *Price v. Jones*, 543
15. *Contract to Pay Member of Family for Services.*—Where there is an express promise to pay for services, an action will lie, although the promise be made to a member of the promisor's family. *Ib.*
16. *Agreement to Release Maker of Note.—Consideration.*—Where one parts with valuable property on the faith of an agreement by the payee of a promissory note, that if he does so the latter will release him therefrom, it is a sufficient consideration to uphold the agreement, although no benefit results to such payee. *Hunt v. Dederick*, 555
17. *Release of Claim Against Debtor.—Consideration.*—Where a creditor agrees to release a claim against his bankrupt debtor, in consideration that the latter will pay his other creditors a certain per cent. of their claims and procure a dismissal of pending bankruptcy proceedings, the consideration, in the absence of fraud or mistake, is a valid one. *Scott v. Scott*, 584
18. *Same.—Performance.—Pleading.*—To make such agreement available as a defence to an action by the creditor on the claim agreed to be released, the debtor must show that he has paid to the other creditors the per cent. agreed upon. A general averment that he "settled with them" is not sufficient. *Ib.*
19. *Same.—Release.—Parol Evidence Admissible to Explain.*—A release, reading "I hereby release my claim for six hundred and thirty-seven and $\frac{7}{10}$ dollars, now in the hands of the assignee, against G—S—, bankrupt," may be explained, qualified or contradicted by parol evidence, and the circumstances under and the purposes for which it was executed may be shown. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT; NEGLIGENCE; RAILROAD.

CONVERSION.

1. *Innocent Purchaser of Personal Property from Fraudulent Possessor.—Liability to Owner.*—Where one falsely and fraudulently represents himself to the owner of personal property to be a member of a responsi-

ble firm of commission men, and by a forged check of such firm in pretended payment obtains from the owner, who believes he is dealing with such firm, the possession of the property, and the same is shipped by the impostor to such firm, and by them sold for him in good faith to an innocent dealer, who in turn disposes of it on his own account, the latter, in the absence of negligence on the part of the owner, is liable to him for the value of such property as for a conversion.

Alexander v. Swackhamer, 81

2. *Same.—Sale.—Delivery.—Title.—Apparent Authority to Sell.*—Under such circumstances there is no sale to the impostor and no title passes, and a delivery by the owner under the erroneous supposition that a sale has been made, neither invests the person to whom the delivery is made with title, nor with an apparent authority to sell the property. *Ib.*
3. *Question of Law and Fact.—Special Verdict.—Practice.*—The question of a wrongful conversion of property is generally a mixed question of law and fact, and when a special verdict is to be returned the jury find the facts and the court applies the law.
Louisville, etc., R. W. Co. v. Balch, 93
4. *Same.—Failure of Jury to Find Material Facts.—Venire de Novo.—Railroad.*—Where the jury, in a special verdict, find that the defendant, a railroad company, "took and converted the property in controversy to its own use," but do not set out the facts upon which such conclusion is based, the court should send them to their room to perfect their verdict, or if this be not done, a *venire de novo* should be granted. *Ib.*
5. *Same.—Sufficiency of Complaint Alleging Conversion.*—A complaint against a railroad company, alleging that the defendant unlawfully and wrongfully took, converted and appropriated the property in controversy to its own use by hauling it away and using it in its road, sufficiently charges a conversion. *Ib.*
6. *Same.—Location of Property.—Motion to Make Specific.—Practice.*—Where, by reason of the loss of his memorandum, the plaintiff alleges that he is unable to locate the property any more definitely than that it was along the line of the defendant's road in certain counties, it is not a reversible error to overrule a motion to make the complaint more specific. *Ib.*
7. *Measure of Damages.*—Where one unlawfully enters upon the premises of another and cuts and hauls to his mill logs belonging to the latter, the measure of damages, in an action by the owner to recover the value of the logs, is the value of the lumber in the logs at the mill and at the time they are there converted by the defendant to his own use, without any reduction for labor bestowed upon them.

Everson v. Seller, 266

CONVEYANCE.

See CONTRACT, 9 to 12; HUSBAND AND WIFE, 1; MARRIED WOMAN; VENDOR AND PURCHASER.

CORPORATION.

See GRAVEL ROAD; RAILROAD; RECEIVER, 5, 6; TELEPHONE.

COSTS.

See EXEMPTION FROM EXECUTION.

COUNTY AUDITOR.

See DRAINAGE, 17, 18.

Performing Work of Predecessor.—Compensation.—Liability of County.—Notice to Board of Commissioners.—If a county auditor is entitled to recover at all against the county for performing work which his predecessor

should have done, he must clearly show that the work should have been performed by his predecessor, and that before proceeding with it he notified the board of commissioners to that effect, and that he would look to the county for compensation. *Severin v. Board, etc., 264*

COUNTY CLERK.

See EVIDENCE; STATUTE OF LIMITATIONS, 1.

COUNTY COMMISSIONERS.

See COUNTY AUDITOR; DRAINAGE, 13, 15; HIGHWAY; RAILROAD, 14, 15.

1. *Liability for Services of Attorney Appointed by Judge to Defend Criminal.*—Although the county commissioners possess no power to contract with an attorney to prosecute or defend a criminal, yet it is within the power of the circuit judge to bind the county to pay for services rendered by an attorney under appointment by such judge, in defence of a prisoner who is found entitled to defend as a poor person. *Board, etc., v. Courtney, 311*
2. *Same.—Failure of Judge to Make Allowance.*—The failure of the court, under the order of which an attorney performs services in defence of a prisoner, to make an allowance therefor, does not discharge the county from its obligation to pay. *Ib.*
3. *Same.—Appointment of Attorney after Change of Venue.*—Where the court to which a criminal case is taken for trial on a change of venue appoints an attorney to defend the prisoner, the county in which the case originated is liable to the same extent as if the appointment had been made and the case tried in that county. *Ib.*
4. *Same.—County Liable for Services in Supreme Court.*—Under such appointment, the county is liable not only for services in the trial court, but also for the services of the attorney in preparing and prosecuting an appeal to the Supreme Court. *Ib.*
5. *Contract.—Allowance.—Voluntary Services.*—A board of county commissioners can make no contract of any kind with one of its members, and no legal allowance can be made by such board to a county commissioner for services voluntarily rendered, or things voluntarily furnished, the county by him. *Waymire v. Powell, 328; Waymire v. Board, etc., 600*
6. *Same.—Appeal.*—An allowance by a board of commissioners to one or more of its members for services rendered in inspecting, examining and measuring the abutments of a bridge, which had been built in pursuance of a contract theretofore made with such board, is illegal and may be appealed from by any person interested. *Ib.*

COUNTY SURVEYOR.

See DRAINAGE, 10, 17 to 19, 21.

COURTS.

See CONTEMPT; CRIMINAL LAW, 31; JUDGE; SUPERIOR COURT; SUPREME COURT.

Adjourned Term.—Jurisdiction.—Where a judge, having statutory authority to appoint an adjourned term of court, does make an order in term time for holding an adjourned term, causes notice of such adjourned term to be given, appears at the time and opens court, the proceedings at such a term are not void although held at a time when another court of the same circuit might have been in session under the statute, and was in session, presided over by a special judge.

Smurr v. State, 125

CRIMINAL LAW.

See CONTEMPT; INTOXICATING LIQUOR; RECOGNIZANCE; TELEPHONE.

1. *Forcible Entry and Detainer.—Affidavit, Sufficiency of.*—An affidavit charging a defendant with having at, etc., on, etc., unlawfully, violently and forcibly entered into certain premises, "to wit, a certain store-room situate on Main street, in the town of A., in said county and State, and then and there being in the possession of one S.," and with having unlawfully, violently and forcibly expelled the said S. from, and put him out of, the possession of said store-room, and with having in like manner kept him out of the possession thereof, sufficiently describes the premises. *Strong v. State, 1*
2. *Same.—Amendment of Affidavit on Appeal.—Practice.*—If an affidavit, filed before a justice of the peace, can be amended at all on appeal, it can only be by interlineation of and swearing anew to the original, or by the substitution of a new affidavit in its stead. *Ib.*
3. *Same.—Forcible Entry and Detainer.—Proof, what Sufficient.*—In a prosecution for forcible entry and detainer under section 1972, R. S. 1881, proof of such strong-handed proceedings, or such a show of force, as overawed and intimidated the injured party, and as either deterred him from defending his possession, or coerced him into surrendering it, is sufficient to make out a case of forcible entry, and proof of a similar exhibition of force is all that is required to sustain a charge of forcible detainer. *Ib.*
4. *Same.*—Where the charge is for both a forcible entry and a forcible detainer, the party charged may be found guilty of one and acquitted of the other. *Ib.*
5. *Self-Defence.—General Rule.—Exception.*—It is the general rule that a brother may lawfully defend his brother when in peril, and, if need be, take life in such defence, but where both brothers are in fault, and unite in bringing on the fatal rencounter, this rule does not apply. *Smurr v. State, 135*
6. *Same.—Jurisdiction.—Waiver of Irregularity.*—Where a judge assumes to act under lawful authority, his acts will not be void, and if in a criminal case the accused voluntarily goes to trial without objection, an objection after conviction will be too late to be of avail. *Ib.*
7. *Indictment.—Motion in Arrest.*—On a motion in arrest of judgment, if the indictment is found to contain all the essential elements of a public offence, even though to some extent defectively stated, it will be held sufficient. *Graeter v. State, 271*
8. *Same.—Permitting Leased House to be Kept as a House of Ill Fame.*—An indictment, which charges that the defendant, at, etc., on, etc., did unlawfully permit a certain frame building, situate on lot No. 41, in the city of V., which he had theretofore let to one A., to be kept as a house of ill fame, and resorted to for the purpose of prostitution, then and there well knowing that it was so kept, etc., is sufficient on a motion in arrest of judgment. *Ib.*
9. *Same.—Instruction.—Evidence.—Reputation of Defendant for Chastity.*—In the trial of a cause wherein the defendant is charged with having permitted a building theretofore let by him to be kept as a house of ill fame and resorted to with his knowledge for the purpose of prostitution, evidence of the reputation of defendant for virtue and chastity is not admissible; but where such evidence has neither been offered nor admitted, and where his reputation has been in no way suggested during the trial, an instruction to the jury, that it was competent for the State to prove the reputation of the defendant for chastity and virtue, is not such an error as would justify a reversal. *Ib.*

10. *Same.—Actual Knowledge of Defendant.*—In such a case an instruction that a landlord could not be convicted of the offence charged without proof that he had knowledge that the house let was kept as a bawdy-house, but that it was not necessary to prove that he had witnessed acts of prostitution in the house, or that he had been personally notified of such acts; that knowledge might be proved by circumstantial evidence, by proof of such facts and circumstances as would justify the jury in coming to the conclusion that he had such knowledge, is not erroneous, the jury having been instructed as to the doctrine of reasonable doubts. *Ib.*
11. *Same.—Instruction.—Purpose of Statute.*—In such a case an instruction that "the statute upon which this prosecution is based was enacted for the first time in this State in 1881; prior statutes had proven insufficient to restrain what all good citizens regarded as a growing evil; this statute aims to lessen the evil by interposing a formidable obstacle to the securing of houses and shelter for prostitutes," contains nothing that could have prejudiced the defendant. *Ib.*
12. *Same.—Prima Facie Case.—Want of Knowledge.*—Where, in such a case, it is proved by the State that the ill fame of the house existed, and that it was flagrant and notorious, and the other elements of the case are made out, a *prima facie* case is made out, and it is then incumbent on the defendant to show that he had no knowledge, or that the circumstances were such that he may have remained ignorant of the facts, want of knowledge being a fact so peculiarly within his own breast that it must be regarded as an essential element of his defence. *Ib.*
13. *Bill of Exceptions.—Instructions.—Practice.*—All exceptions in criminal causes, not saved by the entry of the clerk as a part of the proceedings in court, must be embraced in a bill of exceptions. Sections 1845-1849, R. S. 1881. This rule applies to instructions. *Leverich v. State, 277*
14. *Same.—Intent to Murder.—Threats.—Evidence.*—In a prosecution for assault and battery with intent to murder, after evidence that the prosecuting witness attacked the defendant has been introduced, proof of previous threats by the former, although never communicated to the latter, is admissible on the ground that such threats may illustrate the character of the attack. *Ib.*
15. *Same.—Newly Discovered Evidence.—New Trial.*—In such case, evidence of threats made by the prosecuting witness against the defendant, discovered after the trial, is cause for a new trial. *Ib.*
16. *Change of Judge.—Application by One Jointly Indicted with Another.—Presence of Other Party.—Severance.*—Where one of two persons jointly indicted for murder separately applies for a change of judge, an order for such change may be made when the other party is not present, the effect of the application and order being to sever the defences. *Shular v. State, 289*
17. *Same.—Separate Trials.—Court may Suggest Propriety of.*—Not only may parties jointly indicted be tried separately upon demand, but the court, when justice requires it, may suggest in express words the propriety of separate trials. *Ib.*
18. *Same.—Employment of Counsel to Assist Prosecuting Attorney.—Discretion of Court.*—It is within the discretion of the trial court to direct the employment of counsel to assist the prosecuting attorney in conducting a trial against a person accused of felony. *Ib.*
19. *Same.—Statute.*—The defendant in a criminal case, who asks the benefit of the provisions of a statute, must take the benefit just as the statute gives it. *Ib.*

20. *Same.—Murder.—Inspection of Place by Jury.—Absence of Accused.—Evidence.*—The court may, without error, upon the request of the defendant in a prosecution for murder, send the jury, unaccompanied by the defendant, to inspect the premises where the homicide was committed, as such view does not constitute evidence in the case. *Ib.*
21. *Same.—Constitutional Law.*—Section 1827, R. S. 1881, providing for a view of the place in which any material fact occurred, "with the consent of all the parties," is constitutional. *Ib.*
22. *Same.—Argument of Counsel.—Practice.*—Misconduct of counsel in argument to the jury, to be available for the reversal of the judgment, must be of such a character as to injure the substantial rights of the defendant. *Ib.*
23. *Same.—Statements as to Collateral Matters.—Character of Accused.*—A statement of the prosecuting attorney in argument, upon a merely collateral matter, which it is apparent does not injure the defendant, and also a statement, without more, that the character of the accused is shown by his own witnesses, will not justify a reversal. *Ib.*
24. *Same.—Impeachment of Witness.—Instruction.*—It is not error to instruct the jury that in passing upon the credibility of a witness they may consider "his impeachment in any case where the witness is found to be successfully impeached." *Ib.*
25. *Same.—Misconduct of Jury.—Affidavits.—Supreme Court.—Practice.*—Where misconduct of the jury is assigned as cause for a new trial, and affidavits and counter-affidavits are filed and evidence is heard, but on appeal only the affidavits in support of the motion are in the record, the question will not be considered. *Ib.*
26. *Instructions.—Harmless Error.*—Verbal inaccuracies in instructions, or technical errors in the statement of merely abstract propositions of law, are not available for the reversal of the judgment, where they result in no substantial harm to the defendant, and where, taking the instructions as a whole, the jury are correctly charged in respect to the law applicable to the facts in the case. *Brown v. State, 385*
27. *Same.—Reasonable Doubt.*—An instruction on the subject of reasonable doubt, that in order to justify an acquittal, the doubt must "arise out of the evidence in the case," and be such as to cause a prudent man to hesitate "in the gravest and most important affairs of life," is erroneous. The evidence must be such as to produce in the minds of prudent men such certainty that they would act upon the conviction produced without hesitation in their own most important affairs. *Ib.*
28. *Same.—Indictment.—Murder.—Mortal Wounds Inflicted by Different Instruments.—Jury Need not Determine Which Caused Death.*—Where the infliction by the accused upon the deceased of two mortal wounds with different instruments, resulting in death, is charged in separate counts of an indictment, the jury may find the defendant guilty as charged in both counts, without determining which wound was the immediate cause of the death. *Ib.*
29. *Same.—Evidence.—Threats.*—Upon the trial for murder of one who has killed a rival suitor, evidence of a general threat made by the defendant to kill any one whose attentions should be received by the object of his jealous regard, is admissible. *Ib.*
30. *Mere Weakness of Mind no Excuse for Crime.*—Immunity from crime can not be predicated upon a merely weak or low order of intellect, coupled with a sound mind. *Wartena v. State, 445*
31. *Same.—Power of Trial Court to Regulate Business andittings.*—It is the province of the *nisi prius* court to regulate the course of business during the progress of trials, and, during the term, to control its own sittings. *Ib.*

32. *Same.—Requiring Night Argument.—Practice.*—Requiring counsel for the defendant in a criminal case to make a night argument, over a request for a postponement until morning, unless it be shown that rights of the accused were thereby affected, is not an available question on appeal. *Ib.*
33. *Same.—Questions of Courtesy.—Supreme Court.*—The Supreme Court will not undertake to regulate mere questions of courtesy between counsel, or between *nisi prius* courts and counsel. *Ib.*
34. *Evidence.—Dying Declarations.*—A dying statement, made by the victim of a homicide, that the defendant had no reason that he knew of for the perpetration of the crime, is the statement of a fact which the declarant would have been allowed to make had he been a witness on the stand, and is admissible in evidence. *Boyle v. State, 469*
35. *Same.—General Character of Rule.*—The rule governing the admission of dying declarations is the same in all cases, whether the defence is insanity, self-defence or an *alibi*. *Ib.*
36. *Same.*—The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the latter. *Ib.*
37. *Same.—Cross-Examination of Defendant.*—A defendant in a criminal case who elects to testify as a witness is to be treated, so far as the cross-examination is concerned, as any other witness. *Ib.*
38. *Same.—Evidence.—Cross-Examination.*—While the cross-examination of a witness must be confined to the subject opened by direct examination, this rule does not restrict such cross-examination to the specific facts developed by the direct examination; and when a subject is once entered on in the examination in chief, it is opened to a full and detailed investigation on cross-examination. *Ib.*
39. *Same.—Instructions to Jury.*—Where an instruction stands alone upon one material point, neither explained nor qualified by any others, and erroneously expresses the law, there should be a reversal; but where it forms one of a series bearing upon a given question, and taking the entire series together the law is correctly stated, the rule is otherwise. *Ib.*
40. *Same.—Testimony of Defendant.*—An instruction to the jury in a criminal case, where the defendant has testified, to the effect, "that such testimony is to be received and weighed as in the case of the testimony of any other witness, and if in such case the defendant has testified to the commission of any other or different crime from the one for which he is being tried, you will not, nor have you the right to, consider such testimony for the purpose of punishing him for the crime here charged, nor must you talk about it in your jury room for that purpose, nor permit it to prejudice you, or bias your judgment against the cause of the defendant. But you may consider such evidence, if any there be in this case, in determining what credibility should be given to the defendant's testimony," is not erroneous. *Ib.*
41. *Same.—Murder.—Manslaughter.—Provocation.*—An instruction which directs the jury that mere words do not constitute such a provocation as will reduce an unlawful killing from murder to manslaughter, is not erroneous. *Ib.*
42. *Same.—Murder in Second Degree.—Self-Defence.*—For instructions on these subjects see opinion. *Ib.*
43. *Same.—Practice.—Argument of Counsel.*—In the course of his argument in a homicide case, the prosecuting attorney, referring to the defendant, said: "Will you believe this man, this person who has told so many lies, and who has just seen the shadow of the gallows!" *Ib.*
Held, not sufficient cause for reversal.

44. *Grand Jury.—Empanelment.—Indictment.*—Where the record discloses enough to authorize the inference that the grand jury were lawfully empanelled, that is sufficient on motion to quash an indictment. *Waller v. State, 589*

DAMAGES.

See ATTACHMENT; CONTRACT, 3 to 5, 7 to 13; CONVERSION, 7; LANDLORD AND TENANT; MASTER AND SERVANT; NEGLIGENCE; PRACTICE, 7; RAILROAD.

DEBTOR AND CREDITOR.

See CONTRACT, 16 to 19; FAMILY SETTLEMENT, 1, 2; HUSBAND AND WIFE, 1; JUDGMENT, 1, 3, 4, 7, 8; SET-OFF, 2; STATUTE OF FRAUDS; WILL, 3.

DECEDENTS' ESTATES.

See APPEAL, 3; FAMILY SETTLEMENT; PARTNERSHIP, 1, 2; PROMISSORY NOTE, 4 to 6; WILL.

1. *Petition of Administrator to Sell Real Estate.—Jurisdiction.*—The circuit court which issues letters testamentary, or letters of administration upon the estate of a decedent, has exclusive jurisdiction of a petition for the sale of the decedent's real estate, in whatever county the same may be situate, to make assets for the payment of the liabilities of such decedent's estate. *Vail v. Rinehart, 6*
2. *Same.—Parties to Administrator's Petition.—Defences to Petition.—Conclusiveness of Judgment.—Former Adjudication.*—Where a person who holds a lien for taxes and improvements on the real estate of a decedent is made a party defendant to a petition filed by the administrator for the sale of such real estate to pay debts, and is properly served with summons, and when such party fails to set up or assert any claim to such lands, or any lien thereon, and judgment is rendered on such petition ordering the sale of the decedent's lands, without providing in any way for the protection or payment of the lien of such defendant, such judgment is a final determination against him, not only as to what was actually decided therein, but also as to every other matter which the parties might have litigated in the case, and he can not, in an action subsequently commenced, enforce such lien. *Ib.*
3. *Administrator.—Failure to Inventory and Account for Assets.—Final Settlement.—Conclusiveness of.*—The assignee of the children of a decedent can not maintain an action against the latter's administrator, who has made a final settlement and been discharged, and while such settlement remains in force, on the ground that, as administrator, he failed to turn over to himself, as guardian of such children, their portion of assets of the estate which he failed, as administrator, to inventory and account for, because such final settlement of the decedent's estate was an adjudication that he had properly accounted for all of such assets. *Carver v. Lewis, 44*
4. *Filing Note as Claim Against.*—It is sufficient to file a note, executed by a deceased person, as a claim against his estate, without any formal complaint. *Price v. Jones, 543*

DEED.

See HUSBAND AND WIFE, 1; MARRIED WOMAN; REAL ESTATE, ACTION TO RECOVER.

DEFAULT.

See JUDGMENT, 2, 6.

DELIVERY.

See CONVERSION, 1, 2; PROMISSORY NOTE, 1, 3.

DESCRIPTION.

See HIGHWAY, 2, 3.

DILIGENCE.

See MASTER AND SERVANT, 10 to 14.

DISABILITY.

See STATUTE OF LIMITATIONS, 2; VENDOR AND PURCHASER, 2.

DISCRETION.

See CRIMINAL LAW, 18; DRAINAGE, 19.

DIVORCE.

Change of Venue.—Practice.—A divorce proceeding has all the requisites of an action, and is a civil action, as defined by the code, in such a sense that the provisions of the civil code providing for a change of venue from the county are applicable. *Musselman v. Musselman*, 44 Ind. 107, disapproved. *Evans v. Evans*, 204

DOMESTIC RELATIONS.

See CONTRACT, 15; FAMILY SETTLEMENT; HUSBAND AND WIFE; MARRIED WOMAN; MASTER AND SERVANT; PROMISSORY NOTE, 4 to 8.

DONATION.

See RAILROAD, 14 to 20.

DRAINAGE.

1. *Act of April 8th, 1881.—Construction of.—Notice.—Easement.*—The provision of the drainage act of April 8th, 1881, which requires notice of the petition to be posted in three public places, etc., provides a means of giving notice to all persons or corporations owning lands described in the petition, and such notice applies as well to those who own easements in land as to those who own any other interest or estate therein. *Indianapolis, etc., G. R. Co. v. State, ex rel.*, 37
2. *Same.—Notice.—Collateral Attack.*—In an action to foreclose a lien on the defendant's right of way for an assessment of benefits growing out of the establishment of a ditch, it will be presumed, as against a collateral attack, that the defendant's interest in such right of way was properly described in the petition, and that proper notice was given. *Ib.*
3. *Same.—Pleading.—Defence to Action to Foreclose Lien.*—In an action to foreclose such lien, an answer that the ditch, as it is being constructed, does not conform to the plans and specifications filed, or to the ditch as described in the report of the commissioners or order of the court; that the commissioner does not intend to build such a ditch as that described and ordered, and that he has departed widely from the specifications in various particulars; that he can not and does not intend to finish the ditch; that he has abandoned the construction of about five hundred feet of the work at one end of the ditch as proposed and laid out, and that by reason thereof the water will be poured into another ditch of inadequate capacity, and will be backed on and over the defendant's road, to its damage in a much larger sum than the amount of its assessment, is bad on demurrer. *Ib.*
4. *Same.—Turnpike Company.—Sale of Property.*—Where a specific statutory lien is acquired upon the whole, or any part of the easement of a turnpike company in its roadway, such lien may be enforced by a decree of foreclosure and sale. *Ib.*
5. *Notice of Filing Petition.—Act of 1883.*—Under section 2 of the drainage act of 1883 (Acts 1883, p. 174), the notice to land-owners provided for

- therein is of the filing of the petition, and it must follow and not precede such filing. *McMullen v. State, ex rel., 334*
6. *Same.—Irregular Notice.—Assumption of Jurisdiction.—Judgment.—Collateral Attack.*—The question as to whether proper notice has been given is a jurisdictional one, and where there is some notice, and the circuit court acts under it as given, although it is irregular and defective, its judgment will stand as against a collateral attack. *Ib.*
 7. *Same.—Resignation of Commissioner after Reference.*—The resignation of one or more drainage commissioners, after a matter has been referred to them by name, and the appointment of their successors, will not affect the proceeding. It is not necessary to name the commissioners in the order of reference. *Ib.*
 8. *Same.—Failure to File Report at Time Fixed.—Collateral Attack.*—The failure of the drainage commissioners to file their report at the time fixed in the order of reference, without obtaining an extension of the time, is an irregularity available on appeal, but not on a collateral attack. *Ib.*
 9. *Same.—Remedy.—Appeal.—Practice.*—Where a remedy by appeal is provided, that remedy must be resorted to for the correction of all errors and irregularities. *Ib.*
 10. *Surveyor's Certificate to Contractor.—Must be Collected as Other Taxes.—Personal Action Against Owner will not Lie.*—An action will not lie against the owner of land, whether a resident or non-resident, for the recovery of the amount of a certificate executed by the county surveyor to a contractor for the construction of a section of ditch, pursuant to section 4305, R. S. 1881, or for the enforcement of the lien thereby given; but it is the duty of such surveyor to file a copy of the certificate with the county auditor, to be charged and collected as other taxes. *Lockwood v. Ferguson, 380; Lockwood v. Chambers, 600*
 11. *Notice.—Appearance.—Waiver.—Joining in Remonstrance.*—The joining in a remonstrance against the establishment of a ditch and the levying of assessments, is an appearance which waives notice. *Sunier v. Miller, 398*
 12. *Same.—Injunction.*—Where there has been no objection to the notice, its validity can not be questioned collaterally in a proceeding for an injunction. *Ib.*
 13. *Same.—Assessments not Reviewable in Suit for Injunction.*—A land-owner can not by a suit for an injunction have a review of the assessment of benefits and damages in a ditch proceeding. Such questions must be litigated before the board of commissioners, where the proceeding originated, or on appeal. *Ib.*
 14. *Same.—Proceedings Must be Void to Authorize Injunction.*—An injunction will lie where the proceedings are void, but not where they are merely erroneous or irregular. *Ib.*
 15. *Same.—Appeal from Board of Commissioners.—Power of Circuit Court to Remand.*—Upon appeal from a decision of the board of commissioners, in a drainage proceeding, the circuit court has authority, after a hearing, when it deems it proper, to remand the case to the board for further action. *Ib.*
 16. *Same.*—An order of the circuit court annulling the assessments, because they are erroneous, and remanding the case for that reason, vacates only that part of the proceeding. *Ib.*
 17. *Repairs.—Duty of County Surveyor.—Payment from County Treasury.—Constitutional Law.*—Section 10 of the drainage act of April 6th, 1885 (Acts 1885, p. 129), making it the duty of the county surveyor to keep the ditches, constructed under the drainage laws of the State,

in repair, and to certify the cost thereof, including his own per diem, to the county auditor, who shall draw his warrant in favor of the certificate-holder upon the county treasury, the latter to be subsequently reimbursed by assessments against the benefited land-owners, is constitutional. *State, ex rel., v. Johnson, 463*

18. *Same.—Mandate to Compel Auditor to Draw Warrant.*—Mandate will lie to compel the county auditor to draw such warrant. *Ib.*
19. *Same.—Powers of Surveyor Discretionary and not Judicial.*—The power devolved upon the county surveyor by said section 10 of the drainage act of April 6th, 1885, is not a judicial, but merely a discretionary one, and such as the Legislature has power to confer upon administrative and ministerial officers. *Ib.*
20. *Same.—Appropriation.*—The setting apart by section 10 of such act of so much of the county revenue as is necessary to pay the cost of the repairs provided for therein is a sufficient appropriation made by law within section 3, article 10, of the Constitution. *Ib.*
21. *Same.—Appeal.—Day in Court.*—The appeal to the circuit court authorized by such section from assessments made by the county surveyor is sufficient to afford any aggrieved party a day in court. *Ib.*
22. *Change of Judge.—Civil Action.*—A drainage proceeding is so far a civil action that the provisions of sections 412 to 417, R. S. 1881, in relation to a change of judge, are applicable thereto. *Bass v. Elliott, 517*
23. *Same.—Remonstrance.—Special Finding.—Absence of Finding as to Public Utility, etc.*—Where it does not affirmatively appear from the special finding of facts, in a drainage proceeding, either that the proposed drain will improve the public health, or benefit a public highway or street, or be of public utility, the judgment must be for the remonstrants. *Ib.*
24. *Same.—Exception to Conclusion of Law Admits Correctness of Facts.*—By excepting merely to the conclusions of law drawn from a special finding of facts, a party admits that the facts have been fully and correctly found by the court. *Ib.*

DRUNKENNESS.

See LIFE INSURANCE; RAILROAD, 4.

Not Available to Avert Consequence of Act.—Voluntary drunkenness is not available to avert the usual and natural consequence flowing from a man's act, and a drunken man will be held to the same measure of responsibility as a sober one, and his actions judged by the same standard, except in case of contracts.

Welty v. Indianapolis, etc., R. R. Co., 56

DYING DECLARATIONS.

See CRIMINAL LAW, 34 to 36.

EASEMENT.

See DRAINAGE, 1 to 4; GRAVEL ROAD.

EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

EQUITY.

See CHATTEL MORTGAGE; FAMILY SETTLEMENT, 1, 2; JUDGMENT, 3, 4; REAL ESTATE, ACTION TO RECOVER, 1; SET-OFF; WILL, 3.

ESTOPPEL.

See FORMER ADJUDICATION; JUDGMENT, 2; MARRIED WOMAN; RAILROAD, 22.

EVIDENCE.

See ATTACHMENT, 2, 3; CRIMINAL LAW, 3, 9, 10, 12, 14, 15, 20, 27, 29, 34 to 38, 40; HABEAS CORPUS, 3; INSTRUCTIONS TO JURY, 1, 2; INTOXICATING LIQUOR, 2, 6 to 8; PLEADING, 2, 3; PRACTICE, 4, 5, 7; RAILROAD, 10, 13; REAL ESTATE, ACTION TO RECOVER, 3; STATUTE OF LIMITATIONS, 4; SUPREME COURT, 2, 4; TELEPHONE, 6; WILL, 6 to 10, 13.

Transcript.—Certificate of Clerk.—The certificate of a clerk of the circuit court, which certifies, over the proper signature and the seal of such court, "that the above and foregoing is a full, true and complete copy and transcript of proceedings had and papers filed in said matter, as fully as the same appears of record and from the files of said court, in my office remaining," is sufficient in form and substance to render all matters set forth in such transcript competent evidence for whatever it may be worth or tend to prove. *Vail v. Rinehart*, 6

EXECUTION.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; CONTRACT, 19; EXEMPTION FROM EXECUTION; GRAVEL ROAD; HABEAS CORPUS, 4; INJUNCTION.

EXECUTORS AND ADMINISTRATORS.

See APPEAL, 3; DECEDENTS' ESTATES; PARTNERSHIP, 2.

EXEMPTION FROM EXECUTION.

Malicious Prosecution.—Judgment for Costs.—Where a judgment for costs is rendered against the plaintiff in an action for malicious prosecution, he is not, as to such judgment, entitled to claim the exemption from execution provided by section 703, R. S. 1881. *Russell v. Cleary*, 502

EXHIBIT.

See PLEADING, 4, 5.

FAMILY SETTLEMENT.

See WILL, 1 to 4.

1. *Will.—Agreement between Husband and Wife.—Election by Husband.—Relinquishment.*—Where a husband, to secure a life estate in the homestead owned by his wife, verbally promises to relinquish his claim to all other interest in her property, and she, in consideration of that promise, undertakes to vest such life-estate in him, the agreement is valid and may be carried into effect by will, and a family settlement after her death. *Wright v. Jones*, 17
2. *Same.—Contract.—Equitable Consideration.—Debtor and Creditor.*—In such case, an equitable consideration is sufficient to uphold the contract of the husband, and he may perform it, notwithstanding the objections of his creditors. *Ib.*
3. *Same.—Parol Partition.*—A parol partition of lands, where possession is taken or retained under the agreement of partition, is valid, and the principle that governs such partitions applies to family settlements. *Ib.*

FENCES.

See CONTRACT, 9; RAILROAD, 1 to 4.

FORCIBLE ENTRY AND DETAINER.

See CRIMINAL LAW, 1 to 4.

FORECLOSURE.

See CHATTEL MORTGAGE; DRAINAGE, 2 to 4; GRAVEL ROAD; JUDGMENT, 2; REAL ESTATE, ACTION TO RECOVER, 3; SHERIFF'S SALE, 3; TAXES.

FORFEITURE.

See LIFE INSURANCE, 2; RAILROAD, 14 to 23; RECOGNIZANCE, 1, 2; STATUTE, 2.

FORMER ADJUDICATION.

See CONTRACT, 9; DECEDENTS' ESTATES, 2, 3; JUDGMENT, 2.

Conclusiveness of Judgment.—A judgment is conclusive as to all matters which were or might have been litigated in the action, and a bar to any further litigation upon the same cause of action, between the same parties or those claiming under them. *Kurtz v. Carr*, 574

FRAUD.

See CONTRACT, 17; CONVERSION, 1, 2; LANDLORD AND TENANT; STATUTE OF FRAUDS.

GRANTOR AND GRANTEE.

See VENDOR AND PURCHASER.

GRAVEL ROAD.

See DRAINAGE, 4.

1. *Turnpike Company.—Sale of Property.*—Where a specific statutory lien is acquired upon the whole, or any part of the easement of a turnpike company in its roadway, such lien may be enforced by a decree of foreclosure and sale. *Indianapolis, etc., G. R. Co. v. State, ex rel.*, 37
2. *Corporation.—Sale of Property on Judicial Process.*—As a general proposition, it is true that the property of a public corporation, essential to its corporate existence and the execution of its corporate duty, can not be sold on execution or otherwise except as provided by statute, but as respects gravel road companies, statutory authority to that end is conferred. *Ib.*

HABEAS CORPUS.

See BASTARDY, 1, 2.

1. *Motion to Quash Writ.—Sufficiency of Complaint.—Practice.*—In habeas corpus proceedings a motion to quash the writ tests the sufficiency of the complaint or application on which it is issued. *Willis v. Bayles*, 363
2. *Same.—Statutory Requirements.*—Where the complaint in a habeas corpus proceeding complies substantially with the requirements of the statute (section 1108, R. S. 1881), it is sufficient to withstand a motion to quash the writ. *Ib.*
3. *Same.—Imprisonment Under Judgment.—Judgment Must be Void to Entitle Discharge.*—The writ of habeas corpus can not be used for the correction of mere errors in the judgment under which the petitioner is restrained of his liberty. To entitle him to a discharge from custody he must show, either by his petition or proof, that the judgment is void. *Ib.*
4. *Same.—Justice of the Peace.—Execution Against Body.—Jurisdiction.—Erroneous Judgment.—Collateral Attack.*—Where, under sections 1559 and 1560, R. S. 1881, providing for *ca. sa.*, a justice of the peace has jurisdiction of the subject-matter and of the parties, his judgment, upon a defective verdict, however erroneous, is not void, and can not be collaterally attacked by a party thereto in a habeas corpus proceeding. *Ib.*

HARMLESS ERROR.

See CRIMINAL LAW, 26; INSTRUCTIONS TO JURY, 3; INTERROGATORIES TO JURY, 2; PRACTICE, 3; SUPREME COURT, 3.

HIGHWAY.

See GRAVEL ROAD; RAILROAD, 4, 7.

1. *Appeal from Commissioners.—Special Finding.*—Upon appeal from the action of a board of commissioners in a proceeding for the improvement of a highway, it is not necessary that the circuit court, in a special finding, should set out the steps taken in the case before the commissioners. *Lowe v. Brannan, 247*
2. *Same.—Improvement of Existing Way.—Petition.*—Under a petition asking for the improvement of an existing highway, a new way can not be laid out. The order must be for such a way as the one described in the petition, without material departure from the existing line. *Ib.*
3. *Same.—Description.*—Petitioners for the improvement of an existing highway must describe it with fair and reasonable certainty. It is not sufficient to describe it as it will exist if the improvement is made. *Ib.*

HOUSE OF ILL FAME.

See CRIMINAL LAW, 8 to 12.

HUSBAND AND WIFE.

See FAMILY SETTLEMENT; JUDGMENT, 2; MARRIED WOMAN; SET-OFF, 2; WILL, 1 to 3.

1. *Trusts.—Quieting Title.—Judgment.*—Where a husband receives and uses money belonging to his wife, with the understanding that it is to be returned to her, with interest, and subsequently real estate is purchased and paid for by the husband under an agreement that it is to belong to the wife as an equivalent for her money and interest, but, by mistake and without her knowledge, the deed is made to the husband, she is entitled to have her title quieted as against a judgment creditor of the husband. *Heberd v. Winck, 237*
2. *Act of April 16th, 1881.—Title.—Constitutional Law.*—The subject of the act of April 16th, 1881, entitled "An act concerning husband and wife," is sufficiently expressed in the title to render such act constitutional. *Barnett v. Harshbarger, 410*
3. *Same.—Unity of Husband and Wife.—Rule of Common Law.*—The general rule of the common law, that the husband and wife, in legal contemplation, are one person, still prevails in this State. *Ib.*
4. *Same.—Contracts Between.—Not Governed by General Rules of Law.*—The dealings between husband and wife can not be treated as ordinary contracts, nor are they governed by the general rule applicable to persons who are distinct and separate individuals. *Ib.*
5. *Same.—Statute of Limitations.*—The general statute of limitations does not apply to transactions between husband and wife. *Ib.*

INDICTMENT.

See CRIMINAL LAW, 7, 8, 28, 44; INTOXICATING LIQUOR, 3, 4, 6.

INFANT.

See MASTER AND SERVANT, 5 to 7, 12; VENDOR AND PURCHASER, 2.

1. *Contract.—Purchase of Personal Property.—Rescission.—Recovery of Money Paid.*—An infant who has purchased an unnecessary article of personal property, may rescind the contract and recover the money paid. *House v. Alexander, 109*
2. *Same.—Horse not a Necessary.*—A horse purchased by an infant who is engaged in farming is not a necessary. *Ib.*
3. *Same.—Ratification.*—An infant can not be held to have ratified the contract because the property is still retained by him, after he has

done all in his power to secure a rescission, and has brought suit for that purpose. *Ib.*

4. *Same.—Tender.*—Where a tender is made, and a reason is given for its rejection which shows that a further tender would be fruitless, none other need be made. *Ib.*

INJUNCTION.

See DRAINAGE, 12 to 14.

Execution.—Tender.—Where an execution has been issued on a judgment which is right as to a part of its amount, the execution defendant can not enjoin the collection of the execution until he has first paid or tendered the part which is right. *Russell v. Cleary, 508*

INSANITY.

See CRIMINAL LAW, 30; LIFE INSURANCE, 3.

INSTRUCTIONS TO JURY.

See CONTRACT, 5; CRIMINAL LAW, 9 to 11, 13, 24, 26, 27, 39 to 42; MASTER AND SERVANT, 2; PROMISSORY NOTE, 1; RAILROAD, 8; SUPREME COURT, 1, 3.

1. *Admissions.—Province of Jury.*—The trial court should not declare as matter of law what ought to be left to the jury as a matter of fact, and it is error to embody in an instruction a statement of law, taken from a text-book on evidence, setting forth the circumstances under which the admissions of parties would be entitled either to great or little weight. *Unruh v. State, ex rel., 117*
2. *Same.—Credibility of Witnesses.—Interest in Suit.*—An instruction that the jury should consider the interest of parties and other witnesses and the relationship of witnesses to the parties, in weighing their testimony, is erroneous as invading the province of the jury, and as indicating to them as matter of law that the testimony of such witnesses is entitled to less weight than that of others. *Ib.*
3. *Harmless Error.—Supreme Court.—Practice.*—It is a harmless error, for which a judgment will not be reversed, to refuse to give a correct instruction asked by a party, where the law is properly stated in an instruction given by the court of its own motion. *Everson v. Seller, 266*
4. *Omitted Points.—Practice.*—An objection to an instruction to the jury, that it fails to state the difference between the various paragraphs of defendant's answer, is unavailable. An instruction covering the point should have been asked. *Conrad v. Kinzie, 281*
5. *Same.—Rule of Construction.*—Instructions are to be taken and construed together, and if, when so construed, they contain a correct statement of the law, they will afford no sufficient ground for reversal, even though a single sentence, standing alone and detached from its context, might seem to be erroneous. *Ib.*
6. *Signing.—Practice.*—There is no available error in refusing to give instructions asked by a party, where they are not signed as required by section 533, R. S. 1881. *Chicago, etc., R. R. Co. v. Hedges, 398*

INSURANCE.

See LIFE INSURANCE.

INTEMPERANCE.

See LIFE INSURANCE.

INTENTION.

See WILL, 1, 10, 13.

INTERROGATORIES TO JURY.

See PRACTICE, 5, 6; VERDICT, 6.

1. *Submission by Court.—Presumption.—Cases Modified.*—In the absence of any showing on the subject, when the interrogatories to the jury and their answers to them appear in the record, it will be presumed that the trial court did its duty and submitted to the jury such interrogatories, with instructions to answer the same if they found a general verdict, and the special finding will be considered. Decisions in conflict with this ruling are modified. *Frank v. Grimes, 346*
2. *Motion for More Definite Answers.—Harmless Error.*—It is a harmless error for the trial court to refuse to require the jury to answer more definitely certain interrogatories submitted to them, when it appears that no answers which they could make would change the result. *Chicago, etc., R. R. Co. v. Hedge, 338*

INTOXICATING LIQUOR.

See DRUNKENNESS.

1. *Purchaser of Business not Protected by License of Vendor.*—The purchaser of a saloon from one who has been licensed to sell intoxicating liquors is not protected, in conducting such business, by the license of his vendor. *Heath v. State, 342*
2. *Same.—Sale.—Agency.—Contract.—Evidence.*—For a contract and evidence considered and held sufficient to constitute a sale by the licensee to the person put in charge of the saloon, and not the mere creation of an agency, see the opinion. *Id.*
3. *Selling Without License.—Indictment.*—Where the indictment for selling without a license charges a sale on a certain day, to a certain person, of "intoxicating liquor, in a less quantity than a quart, to wit, one gill of lager beer, at and for the price of five cents," it sufficiently charges a sale in a less quantity than a quart at a time. *Walter v. State, 539*
4. *Same.—Clerical Omission.*—Where the indictment properly charges a sale of intoxicating liquor, the mere clerical omission of the word "liquor" after the word "intoxicating," in the part alleging that the defendant was not licensed, is not a fatal defect. *Id.*
5. *Same.—Statute.—Repeal.*—Section 2090, R. S. 1881, on the subject of selling without license, has reference to classes of business other than the sales of intoxicating liquors, and does not repeal section 5320, which has special application to such sales. *Id.*
6. *Same.—Variance.*—"Jack" and "John."—Where the indictment charges a sale to "Jack Murphy," proof that his right name is "John Murphy" does not constitute a variance. *Id.*
7. *Same.—Former Jeopardy or Conviction.—Parol Evidence.*—A former conviction, or a former putting in jeopardy, can not be proved by parol evidence alone, without laying the proper foundation for secondary evidence. *Id.*
8. *Same.*—The best evidence of the result reached at a former trial is the record, and parol evidence is merely for the purpose of identification. *Id.*

JEOPARDY.

See INTOXICATING LIQUOR, 7, 8.

JUDGE.

See COUNTY COMMISSIONERS, 1 to 4; RECEIVER.

Special Judge.—Regularity of Appointment.—Presumption on Appeal.—Where no objection to the sitting of a special judge was made until after

verdict, it will be presumed on appeal, in the absence of any facts showing that he was not authorized to sit, that the proceedings were regular. *Board, etc., v. Courtney, 311*

JUDGMENT.

See ATTACHMENT, 1, 2; BASTARDY, 1, 2; CONTRACT, 6, 7, 9; DECEDENTS' ESTATES, 2, 3; DRAINAGE, 6; EXEMPTION FROM EXECUTION; FORMER ADJUDICATION; HABEAS CORPUS, 3, 4; HUSBAND AND WIFE, 1; INJUNCTION; PRACTICE, 1, 2, 5; SET-OFF; SHERIFF'S SALE, 2; VENDOR AND PURCHASER, 2; VERDICT, 2, 5; WILL, 12.

1. *Interest Affected by Lien.*—The interest which the lien of a judgment affects is merely the actual interest the debtor has in property. *Wright v. Jones, 17*

2. *Former Adjudication.*—*Default.*—*Married Woman.*—*Mortgage of Land Derived from First Husband.*—*Action for Possession.*—While married a second time a woman executed a mortgage on land derived from her first husband. After her death a suit to foreclose the mortgage was brought and the children by the first marriage were made parties defendants to answer as to their interest. They were defaulted, and a decree of foreclosure was entered and the land was sold. Action by them to recover possession of the land.

Held, that the action is barred by the decree in the foreclosure suit.

Craighead v. Dalton, 72

3. *Lien of.*—*Prior Equities.*—Judgments are merely general liens upon whatever interest the judgment debtor may have in lands, and are not available against the enforcement of prior equities therein.

Heberd v. Wines, 237

4. *Same.*—*Real and Apparent Interest in Land.*—A judgment creditor will not be heard to say that parties, having the one a real and the other an apparent interest in land, shall not do equity as between themselves, merely because one might not have been able to coerce the doing of the right thing by the other. *Ib.*

5. *Review of.*—*When Will not Lie.*—Where the facts entitle a party to the relief awarded, a bill to review will not lie, even though the prayer in the complaint filed in the original action is not broad enough to cover the relief granted. *Freeman v. Paul, 451*

6. *Same.*—*Appearance.*—*Duty of Party.*—*Recital in Summons as to Relief Sought.*—*Practice.*—Where a defendant is served with summons, it is his duty to appear and ascertain the nature of the cause of action alleged against him, and the fact that the recital in the summons does not fully inform him as to the relief sought, will not relieve him of the consequences of his failure to appear. *Ib.*

7. *By Confession.*—*Affidavit of Debtor.*—A judgment by confession before a justice of the peace is valid as between the parties, without an affidavit by the defendant that he justly owes the debt, and void only as to creditors. Section 1490, R. S. 1881. *Chapin v. McLaren, 563*

8. *Same.*—*Knowledge or Consent of Creditor.*—*Ratification.*—*Attorney and Client.*—A judgment by confession in favor of a creditor, entered without his knowledge or consent, is void unless ratified by him; but knowledge and consent on the part of the creditor's attorney are sufficient. *Ib.*

9. *Same.*—*Sheriff's Sale Under Satisfied Judgment Void.*—Where a judgment has in fact been fully paid and satisfied, a subsequent sale of real estate thereunder to any person having actual or constructive notice of such fact is void, and will pass no title. *Ib.*

JUDICIAL NOTICE.

See SUPREME COURT, 6.

JUDICIAL SALE.

See GRAVEL ROAD; JUDGMENT, 9; REAL ESTATE, ACTION TO RECOVER, 2, 3; SHERIFF'S SALE.

JURISDICTION.

See BASTARDY, 1, 2; CHATTEL MORTGAGE; COURTS; CRIMINAL LAW, 6; DECEDENTS' ESTATES, 1; DRAINAGE, 6; HABEAS CORPUS, 4; PARTNERSHIP, 2; RECEIVER, 1 to 3, 8; WILL, 5.

JURY.

See CRIMINAL LAW, 25; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; MASTER AND SERVANT, 2; PROMISSORY NOTE, 1; RAILROAD, 13; VERDICT.

JUSTICE OF THE PEACE.

See APPEAL, 1, 2; HABEAS CORPUS 4; JUDGMENT, 7; PLEADING, 6.

LANDLORD AND TENANT.

*Lease.—Condition as to Sale.—Pretended Sale to Defraud Lessee.—Damages.—*Where a lease is executed, to be effective on the condition that the owner of the land does not sell it, a sale in good faith is contemplated, and if the lessee is defrauded of his rights under the lease by a pretended sale made for that purpose, he may maintain an action against the lessor for damages. *Trout v. Perciful, 538*

LEASE.

See LANDLORD AND TENANT.

LEGISLATURE.

See CONTEMPT, 2, 3; SHERIFF'S SALE, 4, 5; TELEPHONE, 7, 8.

LICENSE.

See INTOXICATING LIQUOR, 1 to 5.

LIEN.

See CHATTEL MORTGAGE; DRAINAGE; GRAVEL ROAD; JUDGMENT; NEW TRIAL, 3; TAXES.

LIFE INSURANCE.

See PLEADING, 5.

1. *Policy.—Inconsistent Provisions.—Construction.*—Where a policy of insurance contains inconsistent and contradictory provisions, that provision most favorable to the assured will be adopted.

Northwestern M. L. Ins. Co. v. Hazelett, 212

2. *Same.—Intemperance.—Forfeiture.—Cancellation.—General and Specific Provisions.—Inconsistent Stipulations.*—A specific stipulation in a separate clause of a policy of life insurance, that if the assured shall become intemperate to a certain degree the company may cancel the policy, and thus absolve itself from liability, will control a general stipulation that such a degree of intemperance shall work an absolute forfeiture. *Ib.*

3. *Same.—Suicide.—Unintentional Self-Destruction.*—A provision in a policy of life insurance, that, whether sane or insane, if the assured shall die by his own hand, the policy shall be void, has no application to a case where death results by accident, or without intention or expectation, although it be caused by the hand of the assured, *e. g.*, where death is produced by an overdraft of whiskey taken, without any intention of destroying his life, by one who had become physically and mentally weak by causes which he could not control. *Ib.*

4. *Same.—Answers to Questions in Application.—Warranty.—Burden of Proof.*—In an action on a policy of life insurance, the burden is

upon the defendant to prove that answers by the assured to questions contained in the application are untrue. *Ib.*

LIMITATION OF ACTIONS.

See HUSBAND AND WIFE, 5; STATUTE OF LIMITATIONS.

LIS PENDENS.

See VENDOR AND PURCHASER, 1.

LUCRATIVE OFFICE.

See OFFICE AND OFFICER, 1.

MALICIOUS PROSECUTION.

See EXEMPTION FROM EXECUTION.

MANDAMUS.

See DRAINAGE, 18.

MANSLAUGHTER.

See CRIMINAL LAW, 41.

MARRIED WOMAN.

See HUSBAND AND WIFE; JUDGMENT, 2.

Estoppel.—Joining in Deed to Husband's Land.—Assertion by Her of After-Acquired Title.—Warranty.—A wife, who joined her husband in the execution of a warranty deed conveying his land, at a time when she was not liable upon covenants of warranty, is not estopped from asserting a title to such land which she subsequently acquires in her own right. *Snoddy v. Leavitt, 357*

MASTER AND SERVANT.

1. *Negligence.—Injury of Teamster by Factory Machinery.—Act Performed by Direction of Foreman.—Knowledge of Danger.*—One who, while employed to haul stave-bolts to a factory and to unload them at a certain place, to reach which it is necessary to pass through a narrow way under a revolving shaft, which, without his knowledge, had been broken and repaired with projecting bolts after his last previous load had been delivered, and the wagon way so raised that he could not sit on the load and drive under the shaft as he formerly had done without danger, is directed by his employer's foreman to drive under the shaft, then in motion, and unload his wagon at the usual place, and, in attempting to do so, and in ignorance of the danger until it is too late to avert it, is caught by the projecting bolts and injured, the employer is liable, unless, by the exercise of reasonable care, the employee could have discovered and avoided the danger.

Hawkins v. Johnson, 29

2. *Same.—Contributory Negligence.—Instruction.—Province of Jury.*—In such case, the employee being ignorant of any hazard, an instruction that the employer had the right to expect that if there were a hazardous course, and a non-hazardous course, he would adopt the non-hazardous one, and that if he voluntarily chose to take the dangerous course, and was injured, he had contributed to his own injury and could not recover, is an invasion of the province of the jury and erroneous. *Ib.*

3. *Same.—Direction by Employer to Drive Over Particular Way.—Presumption of Safety.*—One who is directed by an employer to drive over a particular way has the right to assume that the way is at least reasonably safe, and, if he had previously driven over it, that it is as safe as on the former occasions. *Ib.*

4. *Complaint.—Railroad.—Negligence.—Motion to Make More Certain.*—Where the complaint in an action against a railroad company for personal injury to plaintiff while in its employ, resulting from the alleged negligence of the defendant and its employees, charges that the plaintiff was ordered to perform certain hazardous work with which he was unacquainted, by "his superior in rank in the service" of such defendant, whereby, etc., the same is not sufficiently specific, and a motion to require the plaintiff to make his complaint more certain, so as to show the position in the defendant's service, and the relation to both defendant and plaintiff, occupied by the persons alleged to have given such orders to him, should be sustained.
Pittsburgh, etc., R. W. Co. v. Adams, 151
5. *Contract of Hiring.—Implied Undertaking of Master.—Co-employee.—Vice-Principal.*—As a general rule, in the contract of hiring, there is an implied undertaking upon the part of the master that he will use all reasonable care to furnish safe premises, machinery and appliances for conducting the business safely, and that he will use all reasonable care to furnish competent and prudent co-employees; and when the master has kept and performed this implied undertaking, the servant can not recover from him for injuries resulting from the business, or the negligence of such co-employees, however dangerous the business; and this rule obtains, regardless of the fact that one employee may be the superior in rank to others in the same general employment, unless he occupies the position of vice-principal. *Ib.*
6. *Same.—Implied Undertaking on Part of Servant.*—In such contract of hiring, there is an implied undertaking on the part of the servant that he will exercise reasonable care to avoid injury, and that he assumes all ordinary risks, incident to the business, and all risks from the negligence of co-employees. *Ib.*
7. *Same.—Minors.*—These general rules apply to minors. *Ib.*
8. *Same.—Master's Liability where Servant is Ordered to do Hazardous Work Outside of Contract.*—The servant's implied assumption of risks, which accompanies and is a part of the contract of hiring, is confined to the particular work and class of work for which he is employed, and if the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it can not be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employees. *Ib.*
9. *Same.*—If, however, the servant, voluntarily and without directions from the master, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied undertaking. *Ib.*
10. *Same.—Defective Machinery, etc.—Knowledge.—Diligence.*—If the servant claim damages from the master for injuries received on account of defective premises, buildings, machinery or appliances, he must allege and prove that the defect or the unfitness, which caused the injury, was known to the master, or was such as with reasonable diligence and attention to his business he ought to have known. *Ib.*
11. *Same.—Latent Defects and Dangers.*—In all cases the master is bound to disclose to the servant latent defects and dangers, of which he has knowledge, or of which he ought to have knowledge by the exercise of reasonable attention, care and diligence, and of which the servant has no knowledge, and would not discover by the exercise of reasonable care. *Ib.*

12. *Same.—Implied Representations of Servant.—Railroad.*—When a person of apparently sufficient age, physical ability and mental caliber to perform the service, seeks an employment at the hands of a railway company, or other master, he will be held to an implied representation that he is competent to perform the duties of the position he seeks, and competent to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence. *Ib.*
13. *Same.—Hazardous Work.—Orders by Co-employee.*—If a servant, upon the orders of a co-employee, employed in the same work with him, and without authority from the master to order and control the servant's work and movements, leaves his work which in the original contract he is hired to perform, and engages in hazardous work, he can not make the master respond in damages for the consequences. *Ib.*
14. *Same.—Contributory Negligence.*—In no case will the master be held as upon a warranty against the negligence of the servant who brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence. *Ib.*

MAYOR.

See PLEADING, 6; RECOGNIZANCE, 1.

MEASURE OF DAMAGES.

See CONTRACT, 4, 10, 12; CONVERSION, 7.

MERGER.

See CONTRACT, 1, 7.

MISNOMER.

See INTOXICATING LIQUOR, 6.

MISTAKE.

See CONTRACT, 17; HUSBAND AND WIFE, 1; VENDOR AND PURCHASER, 3.

MORTGAGE.

See CHATTEL MORTGAGE; JUDGMENT, 2; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE, 3; TAXES; VENDOR AND PURCHASER, 3.

MUNICIPAL CORPORATION.

See CITY; COUNTY COMMISSIONERS.

MURDER.

See CRIMINAL LAW, 14, 16, 17, 20, 28, 29, 34 to 36, 41, 42.

NEGLIGENCE.

See CONTRACT, 3; CONVERSION, 1; DRUNKENNESS; MASTER AND SERVANT; PRINCIPAL AND AGENT.

1. *Special Verdict.—Issue Involving Negligence.—Law and Fact.*—When, upon an issue involving negligence, the principal or ultimate facts are determined by the jury, it then becomes the function of the court to decide, as a question of law, upon the facts found, whether or not the party to whom negligence is imputed was negligent.
Conner v. Citizens St. R. W. Co., 62
2. *Same.*—In an action for damages, growing out of the alleged negligent conduct of the defendant, a paragraph of the special verdict which recites "that the conduct of the plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not wholly contribute to said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant, driver of said car," contains

nothing more than inferences or conclusions, and will not be regarded as a finding of facts. *Ib.*

3. *Same.—When a Question of Law.*—Where the facts are undisputed, or where the jury have agreed upon and returned a special verdict setting forth the principal, contested facts, it is the province of the court to settle the question of negligence as a question of law. *Ib.*
4. *Same.—Contributory Negligence.—Getting on and off Street Car when in Motion.*—The rules applicable to persons getting on and off cars operated by steam are not to be applied in full force to street railways operated by horse-power. A person having the free use of his faculties and limbs, and having given proper notice of his desire to be taken up, the car having slackened its speed in the usual manner, it is not negligence for him to attempt to get on while it is moving slowly. *Ib.*
5. *Same.*—In an action against a street railway company for personal injuries, alleged to have been occasioned by the negligent conduct of defendant's driver, the facts were that the plaintiff was standing on a crossing, where passengers were usually taken, and signalled an approaching street car, the team attached to which was being driven in a trot; that on receiving the signal the driver slackened the speed of the team, so that when the car reached the plaintiff it was moving slowly; that as the plaintiff was in the act of stepping upon the car the driver struck the team, causing it to start rapidly, thereby suddenly jerking the car, so that the plaintiff was thrown violently to the ground and injured. *Ib.*

Held, that the defendant is liable. *Ib.*

NEW TRIAL.

See CRIMINAL LAW, 15; JUDGMENT, 5, 6; PRACTICE, 1, 2, 7; SUPREME COURT, 3.

1. *As of Right.—Motion after Term.—Practice.*—A motion for a new trial as of right, under sections 1064 and 1065, R. S. 1881, although made at a term subsequent to the rendition of the judgment, need not show specifically the rendition of such judgment, the time of the same, nor that the undertaking had been filed, the record otherwise showing such filing. *Heberd v. Wines, 237*
2. *Same.—Motion Must be Well Taken as a Whole.*—There is no available error in overruling motions and objections where they are not well taken as a whole. *Ib.*
3. *As of Right.—Not Proper in Action to Enforce Lien.*—Where it affirmatively appears that an action is to enforce a lien, a new trial as of right can not be granted. *Williams v. Thames L. & T. Co., 420*
4. *Same.—Appeal.—Practice.*—Where a new trial as of right is erroneously granted, it is proper to remand the cause for judgment upon the first finding or verdict. *Ib.*
5. *Same.—Supreme Court.—Marion Superior Court.*—Where the effect of a judgment of the Marion Superior Court, in general term, is to remand the cause for such error, it will be affirmed by the Supreme Court on appeal. *Ib.*

NON EST FACTUM.

See PRACTICE, 3.

NOTICE.

See CONTRACT, 1 to 5; COUNTY AUDITOR; DRAINAGE, 1, 2, 5, 6, 11, 12; JUDGMENT, 8, 9; RAILROAD, 15; SHERIFF'S SALE, 2; SUPREME COURT, 6; VENDOR AND PURCHASER, 3.

OCCUPYING CLAIMANT.

See PLEADING, 7.

OFFICE AND OFFICER.

1. *Township Trustee.—Lucrative Office.*—The office of township trustee is a lucrative office within the meaning of the State Constitution.
Foltz v. Kertin, 221
2. *Postmaster.—Federal Officer.*—Postmasters are Federal officers under the provisions of the State Constitution.
Ib.
3. *Same.—Eligibility.—Vacation of Office.—Federal and State Officers.*—The general rule is that where a man accepts an office held under the State, he vacates another held under the same sovereignty; but where a Federal office is held at the time of the acceptance of an office created by State laws, the former is not vacated by such acceptance. The Federal office may be surrendered and the State office retained, but if the incumbent elects to hold the former, he must surrender the latter.
Ib.

ORDINANCE.

See CITY.

PARTIES.

See DECEDENTS' ESTATES, 2.

PARTITION.

See FAMILY SETTLEMENT, 3; WILL, 4.

PARTNERSHIP.

See RECEIVER, 2.

1. *Action against Surviving Partner.—Decedents' Estates.*—Upon the death of one of two joint debtors, the creditor has a right to collect his claim, at law, from the survivor, or, at his option, proceed under the statute in regard to the settlement of decedents' estates, against the estate of the deceased.
Ralston v. Moore, 243
2. *Same.—Plea in Abatement.—Jurisdiction.—Promissory Note.*—To a suit on a promissory note executed by a partnership in the firm name, against the surviving partner, a plea in abatement is insufficient which alleges that the defendant and one R., as partners, executed the note in suit; that afterward the defendant withdrew from the firm, leaving in R.'s hands ample means to pay all the firm debts, including the note; that afterwards R. died, and the administration of his estate is still pending; that there are ample means belonging to the estate to pay the debts, including the note, which has never been presented to the administrator or filed against the estate, and that the administrator has not been made a party to the suit, wherefore the court has no jurisdiction.
Ib.
3. *Scope of Business.—When Note Executed by One Partner in Firm Name not Binding on Firm.*—One partner can not, in the absence of express authority, bind the firm or his copartner by a note executed by him in the name of the firm, in a transaction outside the scope of the partnership business, even where the money, property or chose in action for which the note is given is applied to the payment of a firm debt.
Bays v. Conner, 415
4. *Same.—Agreement by One Partner to Pay Firm Debt.—Surety.*—Where one partner, upon a sufficient consideration, agrees to pay a firm liability, he thereby makes it his individual debt, the other partner merely standing as surety.
Ib.

PATENT.

See TELEPHONE, 2.

PAYMENT.

See STATUTE OF LIMITATIONS, 3, 4.

PERSONAL LIBERTY.

See STATUTE, 1.

PERSONAL PROPERTY.

See CHATTEL MORTGAGE; CONVERSION; INFANT, 1, 2.

PLEADING.

See ATTACHMENT, 4; CONTRACT, 18; CONVERSION, 5, 6; CRIMINAL LAW; DECEDENTS' ESTATES, 4; DRAINAGE; HABEAS CORPUS; HIGHWAY, 2, 3; JUDGMENT, 5; MASTER AND SERVANT, 4; PRACTICE; PROMISSORY NOTE, 5, 6; RAILROAD, 5, 9, 10; RECEIVER, 2, 6; RECOGNIZANCE, 2, 4, 6; STATUTE OF LIMITATIONS, 3.

1. *Plea in Abatement.—Demurrer.—Motion to Reject.*—An objection to a plea in abatement, that it has not been verified, does not render it bad on demurrer, and can only be reached by a motion to reject the plea or strike it from the files. *Vail v. Rinehart, 6*
2. *Uncertainty of Complaint.—Evidence.—Variance.*—Where the allegations of a complaint are too general and uncertain, and the defendant has made no motion to have them made more specific, he can not complain of a variance, if such allegations are made more certain by proof on the trial. *Louisville, etc., R. R. Co. v. Hollerbach, 157*
3. *Same.—Variance.*—It is only where the evidence shows a state of facts different from that averred in the complaint, that a fatal variance may be claimed. *Ib.*
4. *Written Instrument.—Filing of Copy.*—Where the complaint alleges that a copy of the written instrument declared on is filed with and made a part thereof, and a copy follows in the transcript immediately after the complaint, this is sufficient to identify and show the filing of such copy. *Northwestern M. L. Ins. Co. v. Hazelett, 212*
5. *Same.—Application for Life Insurance.—Exhibit.*—In an action upon a life insurance policy, it is not necessary to file a copy of the application with the complaint. *Ib.*
6. *Complaint before Mayor or Justice.*—In actions originating before the mayor of a city or a justice of the peace, the complaint is sufficient if it will inform the defendant of the nature of the cause of action, and is so explicit that a judgment thereon will bar another action for the same cause. *Hasty v. City of Huntington, 540*
7. *Complaint.—Motion to Make Specific.—Occupying Claimant.*—Where a complaint, under the occupying claimant law, seeks a recovery for improvements, described merely as "clearing and fencing, removing stones and putting the land in a state of cultivation," of the value of one hundred and fifty dollars, it is error to overrule a motion to make such complaint more specific. *Wallace v. Brooker, 598*

POOR.

See COUNTY COMMISSIONERS.

POSTMASTER.

See OFFICE AND OFFICER.

PRACTICE.

See APPEAL; ARGUMENT OF COUNSEL; CHATTEL MORTGAGE; CONTEMPT, 3, 4; CONVERSION, 3, 4, 6; CRIMINAL LAW; DIVORCE; DRAINAGE; HABEAS CORPUS; HIGHWAY; INSTRUCTIONS TO JURY; INTERROGA-

TORIES TO JURY; INTOXICATING LIQUOR, 7, 8; JUDGMENT, 6; NEW TRIAL; PLEADING; PROMISSORY NOTE, 5, 6; RAILROAD, 10; RECEIVER; RECOGNIZANCE, 3; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS, 4; SUPERIOR COURT; SUPREME COURT; VENDOR AND PURCHASER, 1, 2; VERDICT; WILL, 12.

1. *Motion for New Trial.—Judgment.—Statute Regulating Appeals.*—A motion for a new trial is not a collateral motion, but one directly connected with the judgment, and so long as it remains undisposed of, there can be no final judgment within the meaning of the statute regulating appeals. *New York, etc., R. R. Co. v. Doane, 92*
2. *Same.—Appeal to Supreme Court.*—Where a motion for a new trial was filed on the same day the judgment was rendered, and was not disposed of for six months or more, there was no final judgment from which to appeal until the ruling on the motion. *Id.*
3. *Pleading.—Non est Factum.—Harmless Error.*—It is a harmless error to sustain a demurrer to an unverified answer of *non est factum*, where the general denial, pleaded with it, remains. *Ralston v. Moore, 243*
4. *Evidence.—Exclusion of.*—Where no question was asked a witness, nor anything else done in that connection, except to propose to the court to prove certain recited facts, no question is presented in regard to the exclusion of his testimony. *Id.*
5. *Evidence.—Answers to Interrogatories.—Judgment.*—In determining a motion for judgment on special findings notwithstanding the general verdict, the evidence, whether documentary or otherwise, can not be considered. *Cox v. Ratcliffe, 374*
6. *Same.*—Unless it affirmatively appear that the facts specially found are irreconcilably in conflict with the general verdict, the latter must control. *Id.*
7. *Motion for New Trial.*—Questions as to the admission of evidence, and as to the assessment of damages, which are not presented by a motion for a new trial, will not be considered. *Trout v. Perciful, 532*
8. *Pleading.—Uncertainty.*—Mere uncertainty in a pleading can not be reached by demurrer. The objection must be made by motion. *Sannes v. Ross, 558*
9. *Special Finding.—Exception to Conclusion of Law Admits Correctness of Facts.*—By excepting merely to the conclusions of law upon a special finding of facts a party admits that the facts have been correctly found. *Kurtz v. Carr, 574*

PRESUMPTION.

See APPEAL, 2; INTERROGATORIES TO JURY, 1; JUDGE; RECOGNIZANCE, 3, 5; WILL, 8.

PRINCIPAL AND AGENT.

See INTOXICATING LIQUOR, 2.

Authority to Receive Property at "Landing."—Wharf-boat.—Negligence.—Liability of Wharfinger.—One who has authority to receive and take property from a "landing" has authority to receive and take it from a wharf-boat stationed and used at a particular wharf, and constituting one of the landing facilities, and for the negligence of his agents in removing the property from the boat, resulting in the loss of such property, the owner of the wharf-boat is not liable.

Davis v. Reamer, 318

PRINCIPAL AND SURETY.

See PARTNERSHIP, 4; PROMISSORY NOTE, 2; RECOGNIZANCE.

PROMISSORY NOTE.

See CONTRACT, 16; DECEDENTS' ESTATES, 4; PARTNERSHIP, 2, 3; STATUTE OF LIMITATIONS, 3, 4.

1. *Instruction to Jury.—Signing and Delivery on Sunday.—Province of Jury.*—In an action on a promissory note, alleged by the defendant to have been signed and delivered on Sunday, an instruction "that, before the defendant can successfully make out that kind of a defence, he should have pleaded in writing, as well as proved by a fair preponderance of the evidence, that he not only executed the note on Sunday, but that it was delivered and accepted by the plaintiff on Sunday," is correct, and does not invade the province of the jury.
Conrad v. Kinzie, 281
2. *Principal and Surety.—Accommodation Endorser.—Subrogation.*—One who becomes accommodation endorser for two joint makers of a promissory note at the request of only one of such makers, upon being compelled to pay, is subrogated to the rights of the original creditor, and may maintain an action against the other maker, both presumptively standing to him as principals.
Hoffman v. Butler, 371
3. *Same.—Delivery.—Implied Authority of One Joint Maker to Procure Endorser.*—A promissory note is not a complete instrument until delivery, and the possession of it by one joint maker impliedly authorizes him to secure an additional endorser.
Ib.
4. *Promise to Pay After Death.—Testamentary Disposition.*—An instrument, dated and signed, reading, "One day after my death I promise to pay to the order of Nancy M. Jones two thousand dollars, to be paid out of my estate. For value received, without any relief from valuation or appraisement laws, with 6 per cent. interest from date until paid, and attorney's fees," is a promissory note, and not an attempted testamentary disposition of property.
Price v. Jones, 543
5. *Same.—Decedents' Estates.—Filing Note as Claim Against.—Pleading.*—It is sufficient to file a note, executed by a deceased person, as a claim against his estate, without any formal complaint.
Ib.
6. *Same.—Attorney's Fees.—Recovery of.*—The stipulation in the note for attorney's fees entitles the payee to recover them without any specific demand therefor.
Ib.
7. *Same.—Consideration.—Agreement of Parties as to.*—Where parties agree upon a consideration, and it is one of an indeterminate value, the courts will not substitute their judgment for that of the parties, but will uphold the contract.
Ib.
8. *Same.—Contract to Pay Member of Family for Services.*—Where there is an express promise to pay for services, an action will lie, although the promise be made to a member of the promisor's family.
Ib.

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 18.

PROSTITUTION.

See CRIMINAL LAW, 8 to 12.

PUBLIC USE.

See TELEPHONE, 3, 4.

QUANTUM MERUIT.

See CONTRACT, 11 to 13.

QUIETING TITLE.

See HUSBAND AND WIFE, 1.

QUO WARRANTO.

See RAILROAD, 22, 23.

RAILROAD.

See CONTRACT, 9; CONVERSION, 4; DRUNKENNESS; MASTER AND SERVANT, 4 to 14.

1. *Statutory Action.—Contributory Negligence.*—Contributory negligence is not a defence to an action based upon the statute imposing upon railroad companies the duty of fencing their tracks.
Welty v. Indianapolis, etc., R. R. Co., 55
2. *Same.—Cattle-Guards.*—The failure to construct cattle-guards, where it is the duty of the railroad company to construct them, is regarded as a failure to fence. *Ib.*
3. *Same.—Abandonment of Animal by Owner.*—An owner who abandons his animal can not recover, although it enters upon the track of a railroad, and is killed, at a place where the company has failed to perform its statutory duty by fencing its track. *Ib.*
4. *Same.*—Where the borrower of a horse, while intoxicated, rides the animal along a highway to a railroad crossing, and, there being no fence or cattle-guard as required by statute, the horse turns and proceeds upon the track until killed by an approaching train, the railroad company is not liable to the owner in an action based upon the statute requiring such companies to keep their tracks securely fenced. *Ib.*
5. *Action for Damages.—Wilful Killing.—Sufficiency of Complaint.*—A complaint against a railroad company, to be good as charging wilfulness in the killing by a train of cars of a person for whose death damages are sought to be recovered, must show that the deceased was purposely or wilfully killed, or that the train was purposely or wilfully run upon him. It is not sufficient to charge that the acts in the management of the train, resulting in the death, were purposely and wilfully done. *Chicago, etc., R. R. Co. v. Hedges, 398*
6. *Same.—Trespasser.*—A railroad company is not liable for the killing of a person unlawfully upon its track, unless the killing be wilful. *Ib.*
7. *Same.—Use of Track as Part of Highway.*—Where a part of a railroad track, not within the limits of a street, is habitually used by the public in approaching the railroad depot, with the knowledge and consent of the company, a person so using it is not a trespasser. *Ib.*
8. *Same.—Negligence.—Liability of Company.—Instruction.*—An instruction that although the person injured was unlawfully upon the railroad track "the company will be responsible if its employees are guilty of gross or reckless negligence, and could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness," is erroneous under any issue. *Ib.*
9. *Same.—Pleading.*—In pleading, the words "gross negligence" and "recklessness" can not be substituted for wilfulness. *Ib.*
10. *Same.—Evidence.—Practice.*—Evidence of wilful conduct is only available under a pleading charging wilfulness. *Ib.*
11. *Same.—Care Required in Crossing Track.*—A person about to cross a railroad track must, to be free from negligence, take such precautions as could reasonably be expected from an ordinarily prudent person under like circumstances; but the fact that he does not, at the instant of stepping upon the track, look to ascertain if a train is approaching, is not conclusive of want of due care on his part. *Ib.*
12. *Same.—Contributory Negligence.—Deceptive Appearances.*—Negligence can

- not be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent man. *Ib.*
13. *Same.—When Question for Jury.*—When there is evidence tending to show that the plaintiff was thrown off his guard by conduct on the part of the defendant which might have such effect upon an ordinarily prudent man, it is proper to submit the question of contributory negligence to the jury. *Ib.*
 14. *Public Aid.—Forfeiture.—Repeal of Statute.—Case Criticised.*—That part of section 18 of the act of 1869 (Acts 1869, Spec. Sess., p. 92, section 4062, R. S. 1881), providing that a failure on the part of a railroad company, to which a donation has been voted, to complete its road within three years from the levying of the special tax, or within the additional year that might be given by the board of commissioners, should forfeit the right of the company to the donation, was repealed by the act of January 30th, 1873 (Acts 1873, p. 184). *Indianapolis, etc., R. W. Co. v. Board, etc.*, 70 Ind. 385, criticised.
Board, etc., v. Center Township, 422
 15. *Same.—Act of January 30th, 1873.—Order of Forfeiture by County Commissioners on Petition and Notice.*—Under the act of January 30th, 1873, there could only be a forfeiture when the county board, on the application of twenty-five freeholders and after notice, should make an order cancelling the donation. *Ib.*
 16. *Same.*—Such an order could not be made until after the expiration of three years from the placing of the tax upon the duplicate, and, if before that time the railroad company should expend in the construction of its road in the township a sum equal to the donation, there could be no forfeiture. *Ib.*
 17. *Same.—When Act of 1873 Applies to Proceedings begun under Act of 1869.*—Where a railroad company, to which aid was voted under the act of 1869, had until June, 1874, within which to complete its road, and the special tax was collected during the years 1871, 1872 and 1873, the act of January 30th, 1873, relating to the method of forfeiture, would apply. *Ib.*
 18. *Same.—Where Forfeiture not Declared, Railroad Entitled to Donation Notwithstanding Delay in Work.*—Where a donation was voted by a township under the act of 1869, to aid in the construction of a railroad, and there was no forfeiture under section 18 of that act, nor under the act of 1873, by which such section was repealed, nor under any subsequent act, the railroad company is entitled to the money donated, although its road was not completed until 1880. *Act of March 7th, 1877, Acts 1877, Reg. Sess.*, p. 111. *Ib.*
 19. *Same.—Act of March 11th, 1875.—Effect of Proviso.*—The act of March 11th, 1875, re-enacts the second section of the act of January 30th, 1873, only changing the time from three to five years, within which the railroad company shall expend in the township a sum equal to the donation, and the proviso to the act of 1875, that it shall not apply to any railroad where three years have elapsed since the special tax shall have been placed on the duplicate, merely denies to such company the benefit of the extension of time. *Ib.*
 20. *Same.—Alterations in Line.*—Alterations in the line of the road which do not change the terminal points, nor materially affect the general route, will not defeat the right of the company to a donation. *Ib.*
 21. *Formation of Corporation.—Subscription to Stock.—Must be in Good Faith.—Ability to Pay.*—Under the statute providing for the formation of railroad corporations and requiring stock to the amount of at least fifty thousand dollars to be first subscribed, the subscriptions must be made

in good faith, by persons who have a reasonable expectation of ability to pay. *Holman v. State, ex rel., 569*

22. *Same.*—*Quo Warranto.*—*State not Concluded by Articles of Association.*—In a direct proceeding by the State, by *quo warranto*, against individuals who assume to act as a railroad corporation, requiring them to show cause for so acting, a showing by the defendants of the filing of articles of association and a subscription of the minimum amount of stock required by law is not conclusive upon the State. *Ib.*
23. *Same.*—*Insolvency of Subscribers.*—*Forfeiture.*—Where it is established in such proceeding that the subscribers to a large part of the fifty thousand dollars of stock are insolvent, and were so at the time they subscribed, with no expectation of ability to pay, a forfeiture will be declared. *Ib.*

RATIFICATION.

See INFANT, 3; JUDGMENT, 8.

REAL ESTATE.

See CRIMINAL LAW, 1 to 4; DECEDENTS' ESTATES, 1, 2; FAMILY SETTLEMENT; HUSBAND AND WIFE, 1; JUDGMENT, 1 to 4, 9; LANDLORD AND TENANT; MARRIED WOMAN; PLEADING, 7; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; TAXES; VENDOR AND PURCHASER; WILL.

REAL ESTATE, ACTION TO RECOVER.

See JUDGMENT, 2.

1. *Defence.*—*Equitable Mortgage.*—Where one holding a deed absolute on its face sues to recover possession of the land therein described, the person in possession may defeat a recovery by proof that the deed was taken as security for money loaned to, or advanced as a loan for, the person in possession. The real nature of the transaction may be inquired into, and what purports to be an absolute deed, whether made by the party claiming the equitable right, or pursuant to a judicial proceeding, or otherwise, may be shown to be in legal effect only a mortgage. *Cox v. Ratcliffe, 374*
2. *Same.*—*Sheriff's Sale.*—*Agreement by Purchaser to Extend Time for Redemption.*—*Statute of Frauds.*—An agreement made during the year for redemption by the purchaser at sheriff's sale, or his assignee, by which the time for redemption is extended, is valid, and will prevent such purchaser or assignee from acquiring title made under such sale. Such a contract is not affected by the statute of frauds. *Ib.*
3. *Same.*—*Evidence.*—In an action for possession of real estate, where the plaintiff claims an absolute legal title under a deed, it is proper to admit evidence showing that the plaintiff has another action pending to foreclose the defendant's equity of redemption in the same land, thereby treating such deed as a mortgage, and this, notwithstanding the fact that the foreclosure suit was originally joined with the suit in ejectment, and the causes of action subsequently separated. *Ib.*

RECEIVER.

1. *Jurisdiction.*—*Judge in Vacation.*—Under the provisions of section 1222, R. S. 1881, a judge in vacation is clothed with the same power and authority relative to the appointment of receivers, as is the court itself when in regular and open session, and his acts, orders and proceedings in such premises are the judicial proceedings of the court whereof he is judge. *Pressley v. Lamb, 171*
2. *Same.*—*Voluntary Appearance of Defendant.*—Where a complaint is filed by one partner, before a judge in vacation, asking the appointment of a receiver, and the defendant, a co-partner, voluntarily appears to

such action and files his answer, without process, and submits the same, such judge thereby acquires full and complete jurisdiction both of the subject-matter of the action and the persons of the parties, such voluntary appearance being equivalent to the service of process. *Ib.*

3. *Same.—Collateral Attack.*—The regularity or legality of the appointment of a receiver by a judge in vacation, who has acquired jurisdiction of the subject-matter of the action and the parties thereto, can not be questioned collaterally in a subsequent action. *Ib.*
4. *Same.—Appeal to Supreme Court.*—Whenever the court or judge, either in term time or vacation, appoints or refuses to appoint a receiver, the party aggrieved may, under the provisions of section 1231, R. S. 1881, within ten days thereafter, appeal from the decision of such court or judge without awaiting the final determination of the case. *Ib.*
5. *Appointment by Judge in Vacation.—Insolvent Corporation.*—Under section 1222, R. S. 1881, a judge in vacation may appoint a receiver for a corporation which is in "imminent danger of insolvency."
First Nat'l Bank, etc., v. U. S. Encaustic Tile Co., 227
6. *Same.—Answer Admitting Complaint.—Adversary Proceeding.*—Upon the filing of a complaint against such a corporation, alleging such cause for the appointment of a receiver, an answer admitting the truth of the complaint does not make the suit less adversary in character than it otherwise would be. *Ib.*
7. *Same.—Voluntary Appearance of Defendant.*—The voluntary appearance of the defendant in such proceeding is equivalent to the service of process, and the suit is commenced and pending at and from the time of such appearance. Sections 315 and 1230, R. S. 1881. *Ib.*
8. *Same.—Validity of Proceeding in Vacation.—Collateral Attack.*—The court having jurisdiction of the subject-matter of the suit and of the parties, the proceedings and orders of the judge in vacation are the proceedings and orders of the court, and, even if erroneous, are not void, and can not be collaterally attacked. *Ib.*

RECOGNIZANCE.

See BASTARDY, 2.

1. *Defects do not Invalidate.—Forfeiture.—Mayor of City.—Criminal Law.*—Although a recognizance taken by the mayor of a city, for the appearance before him of one charged with felony, is by mistake made payable to the city, instead of to the State, and to answer a charge of having violated "an ordinance of said city," instead of a statute of the State, it is valid and binding, and upon forfeiture may be enforced by the State. Sections 1221 and 1715, R. S. 1881. *State v. Soudriette, 306*
2. *Forfeiture.—Averments as to Amount of Bail and Officer Taking Same.—Uncertainty of Complaint.*—Where, in an action on a forfeited recognizance, the averments of the complaint, as to the officer before whom the recognizance was entered into and as to the amount of bail which had been fixed in the cause, were too uncertain, but such averments, in connection with the copy of the recognizance filed with the complaint and the official endorsements upon it, show that the recognizance was entered into before the sheriff who arrested and had in custody the principal therein, and that the sum of \$1,000 was endorsed upon the warrant by the clerk who issued it, such complaint is sufficient on demurrer. Section 1684, R. S. 1881. *Carmody v. State, 546*
3. *Same.—Authority of Deputy to Act for Sheriff Presumed.—Defence.*—In such case, the authority of a deputy to act for and in the name of the sheriff will be presumed. If in fact he had no authority to so act, it will constitute matter of defence. *Ib.*

4. *Same.*—*Continuing Recognizance.*—*Answer.*—An answer in such case, alleging that the trial court made no order directing the sheriff to take a continuing recognizance, but failing to aver that the principal therein did not *desire* to enter into a continuing recognizance, is insufficient. Section 1713, R. S. 1881. *Ib.*
5. *Same.*—*Presumption of Desire to Execute Recognizance.*—In the absence of allegations of duress or constraint, it will be presumed that the principal and sureties *desired* to enter into the recognizance to which their names are found attached, and the execution of which is admitted. *Ib.*
6. *Same.*—*Order Fixing Bail.*—*Return of Indictment.*—An answer, averring that the trial court did not, on the return of the indictment or at any time afterwards, fix the amount of bail required of the defendant, but not averring that no such order had been made prior to the return of the indictment, is insufficient. *Ib.*
7. *Same.*—*General Order of Court Fixing Amount of Bail During Term.*—*Exceptions.*—"Discriminating Judgment."—The right of a party charged with a felony to have a discriminating judgment exercised in determining the amount of bail in his particular case, does not restrain the courts from making a general order fixing the amount of bail which shall be thereafter required during a given term, in certain classes of bailable offences, and from enforcing such an order in all cases, except where the exercise of a discriminating judgment is by some means specially invoked, or some question is made upon the alleged injustice of its operation in a particular case. *Ib.*

RELEASE.

See CONTRACT, 16 to 19.

RENTS.

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REPEAL OF STATUTE.

See INTOXICATING LIQUOR, 5; RAILROAD, 14; SHERIFF'S SALE, 3.

RES ADJUDICATA.

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SALE.

See CONTRACT, 1, 2; CONVERSION, 1, 2; DECEDENTS' ESTATES, 1, 2; DRAINAGE, 4; GRAVEL ROAD; INTOXICATING LIQUOR, 1 to 5; JUDGMENT, 9; LANDLORD AND TENANT; REAL ESTATE, ACTION TO RECOVER, 2; SHERIFF'S SALE.

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SET-OFF.

1. *Judgment.—Equity.*—It is only when equity and good conscience require it that a court can order one judgment to be set off against another.
Beard v. Puett, 68
2. *Same.—Husband and Wife.—Assignment of Judgment to Wife to Reimburse Her for Money Advanced to Prosecute Action.*—Where a husband assigns a judgment to his wife to reimburse her for money advanced to him to aid in the prosecution of the action in which it was obtained, the judgment defendant can not, in an action subsequently brought for that purpose, offset judgments held by him against the husband against the judgment so held by the wife.
Ib.

SETTLEMENT.

See CONTRACT, 6; DECEDENTS' ESTATES, 3; FAMILY SETTLEMENT.

SHERIFF.

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SHERIFF'S SALE.

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1. *Agreement by Purchaser to Extend Time for Redemption.—Statute of Frauds.*—An agreement made during the year for redemption by the purchaser at sheriff's sale, or his assignee, by which the time for redemption is extended, is valid, and will prevent such purchaser or assignee from acquiring title made under such sale. Such a contract is not affected by the statute of frauds.
Cox v. Ratcliffe, 574
2. *Under Satisfied Judgment Void.*—Where a judgment has in fact been fully paid and satisfied, a subsequent sale of real estate thereunder to any person having actual or constructive notice of such fact is void, and will pass no title.
Chapin v. McLaren, 563
3. *Mortgage.—Foreclosure.—Redemption.—Change in Law Relating to.—Liability for Rent.*—In 1875, H. mortgaged land to E. In 1878, J. recovered a judgment against H., on which the same land was sold, J. becoming the purchaser, and obtaining a sheriff's deed on March 25th 1879, under which he went into possession. In July, 1879, E. obtained a decree foreclosing his mortgage, the land was sold thereunder, he becoming the purchaser, and receiving a sheriff's deed on September 27th, 1880, up to which time J. remained in possession. Action by E. against J. to recover for rent during the year for redemption.
Held, that the redemption law of March 31st, 1879, which was in force when the sale to E. was made, and which repealed by implication the act of 1861, governs, and that J. is liable. *Edwards v. Johnson, 594*
4. *Same.—Possession Subject to Modifications in Redemption Law.*—Persons who purchase or go into possession of lands, upon which there are subsisting encumbrances, do so subject to any modification in the redemption law which it is competent for the Legislature to make, respecting the contracting parties.
Ib.
5. *Same.—Vested Rights.—Constitutional Law.—Obligation of Contracts.*—There are no vested rights in the law generally, nor in legal remedies, and it is competent for the Legislature to make changes in these so long as they do not affect the obligation of contracts.
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Willis v. Bayles, 363

2. *Forfeitures.—Construction.*—Statutes providing for forfeitures will not be extended by construction so as to work a forfeiture.

Board, etc., v. Center Township, 422

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Wright v. Jones, 17

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Nelson v. Board, etc., 287

2. *Disability.*—The statute of limitations begins to run at the time the cause of action accrues, although the party is under legal disability, but where it has fully run during such disability the action may be brought within two years after the removal thereof.

Barnett v. Harshbarger, 410

3. *Promissory Note.—Payment.—Pleading.*—To an answer to a complaint declaring on a promissory note, alleging that the cause of action did not accrue within twenty years, a reply that the defendant had made payments on the note within twenty years, which were endorsed thereon, and that the defendant "then and there and thereby acknowledged the validity of such note and promised to pay the same," is good.

Willey v. State, ex rel., 453

4. *Same.—Payment only Prima Facie Evidence of New Contract.—Rebutting Evidence.—Practice.*—Under sections 301 and 303, R. S. 1881, payment on the cause of action is only *prima facie* evidence of a new or continuing contract and may be rebutted by other evidence, but the question as to whether the rebutting evidence is sufficient is for the trial court. The Supreme Court will not weigh the evidence.

Id.

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1. *Marion Superior Court.—Parties not Appealing to General Term can not Appeal to Supreme Court.—Dismissal of Appeal.*—Where parties, against whom judgment is rendered in the Marion Superior Court at special term, do not join in an appeal to the general term of such court, they are not parties to the judgment of the court in general term, and an appeal by them from such judgment to the Supreme Court will be dismissed. *McNeely v. Holliday, 324*
2. *Same.—When Appeal will Lie from Judgment at Special Term to Supreme Court.*—No appeal will lie from the judgment of the Marion Superior Court at special term, directly to the Supreme Court, except where some of the judges of the general term are shown to be incompetent, and then only when an appeal is perfected within one year from the rendition of the judgment. Section 1362, R. S. 1881. *Ib.*

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1. *Instructions.—Brief.—Practice.*—Where the legal proposition involved in an instruction is not stated in the brief of counsel, and nothing more is done than to indicate to the court the page of the record on which it may be found, with general observations concerning it, the objection to it will not be considered. *Northwestern M. L. Ins. Co. v. Haselett, 212*
2. *Same.—New Trial.—Evidence.—Bill of Exceptions.*—A motion for a new trial, based on alleged errors arising on the admission and exclusion of evidence, which refers to the evidence as set out in a bill of exceptions not yet filed, presents no question. *Ib.*
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1. *State Regulation.—Act Limiting Rental Price of Instruments.—Constitutional Law.*—The State has the right to prescribe the maximum price, which a telephone company shall charge for the use of its telephones, and the act of April 13th, 1885, limiting the rental price of such instruments, and also the amount which shall be collected for conversations between cities and villages, is constitutional. *Hockett v. State, 250, 599*
2. *Same.—Patent.—Power of State to Regulate Property Created Under.*—The fact that the telephone and appliances are articles patented under the Constitution and laws of the United States, while vesting in the patentee, his heirs and assigns, the exclusive right, for a limited time, to make, use and vend the tangible property brought into existence by the application of the discovery covered by the letters patent, does not preclude State regulation of the property thus brought into existence. *Ib.*
3. *Same.—Property Devoted to Public Use.*—In legal contemplation all the instruments and appliances used by a telephone company in the prosecution of its business are devoted to a public use, and property thus devoted to such use becomes a legitimate subject of legislative regulation. *Ib.*
4. *Same.—Guaranteed Rights in Property.*—State regulation of property devoted to a public use is not the taking of property for a public purpose within the meaning of section 21, of article 1, of the Constitution of this State, nor is it an interference with the guaranteed rights of the citizen in private property. *Ib.*
5. *Same.—Word "Telephone" Includes all Instruments for Reception and Transmission of Messages.*—The word "telephone," as used in the act of April 13th, 1885, was intended to designate, and did in fact refer to an apparatus composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument only. *Ib.*
6. *Same.—Term of Art.—Evidence.*—The word "telephone" having become a term of art, evidence is admissible to explain its proper meaning. *Ib.*
7. *Same.—Legislative Intention.*—There being nothing in the act of April 13th, 1885, or in other laws, which requires a telephone company to construct a new line against its will, or to maintain an old line longer than it may feel justified in doing, evidence that it could not construct, or continue to use, a particular line at the price limited without loss, can not be considered in determining the legislative intention in passing such act. *Ib.*
8. *Same.—Justice or Expediency of Act.—Remedy.*—Where a statute is one which the Legislature had power to enact, the courts can not sit in judgment upon either its justice or expediency, but relief must be sought of the Legislature. *Ib.*

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2. *Same.*—*Supreme Court.*—*Judgment Against Infant.*—*Appeal after Removal of Disability.*—*Confession of Errors.*—*Collusion.*—*Defence by Grantee in Name of Grantor.*—R., claiming to own land which had been deeded to his infant son, brought an action against the latter to have his title quieted, which was done. R. then sold the land by warranty deed to G., and the latter to P. After R.'s son became of age he appealed from the judgment in favor of his father to the Supreme Court. P. filed an application to be allowed to defend, either in his own name or in the name of R., showing his interest, and alleging that R. is insolvent, and that he and his son had colluded to procure a reversal of the judgment, and that R. had executed a confession of errors. Subsequently a confession of errors was filed.

Held, that the confession of errors should be disregarded, and P. allowed to defend in R.'s name. *Ib.*

3. *Rights of Third Persons.*—*Notice to Purchaser.*—*Inquiry.*—*Mortgage.*—*Satisfaction by Mistake.*—Where a mortgagee, by mistake and without consideration, has actually entered satisfaction of the mortgage on the margin of the record, notice given by him to a subsequent purchaser of the land from the mortgagor, who still owes a part of the purchase-

money, that he has a claim on the land, and that the entry of satisfaction is a forgery, is sufficient to put such purchaser on inquiry, and further payment to his vendor is at his peril. *Clift v. Nay, 355*

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1. *Special.—Province of Jury.—Practice.*—In framing and returning a special verdict, the whole duty of the jury is discharged when they have found and set forth, in an orderly and intelligible manner, all the principal facts which were proven within the issues submitted to them. *Conner v. Citizens St. R. W. Co., 62*
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5. *Same.—Conclusions of Law, etc.—Venire De Novo.*—If a special verdict include findings of evidence, conclusions of law and matters outside the issues, such findings will be disregarded; still, if such verdict, stripped of such superfluities, is yet sufficient to lead up to and support a judgment either way under the issues, a motion for a *venire de novo* will be overruled. *Ib.*
6. *Interrogatories to Jury.—Answers to Must be Considered as a Whole.—General Verdict.—Practice.*—Where the jury's answers to interrogatories, taken as a whole, are consistent with the general verdict, the latter will stand, although some answers separately are seemingly inconsistent therewith. *Davis v. Reamer, 318*

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1. *Construction.—Life-Estate.—Devise of Fee to Trustee.*—Where all the fee of a wife's estate is devised by her to a trustee with the power of management and disposition, and a life-estate in part of it is carved out for her husband, with the remainder in fee vested in the trustee, the husband takes no greater estate under the will than that carved

out for him. Such a devise to the husband shows an intention on the part of the testatrix to make the testamentary provision take the place of the provision made by law. *Wright v. Jones, 17*

2. *Same.—Agreement between Husband and Wife.—Election by Husband.—Relinquishment.—Family Settlement.*—Where a husband, to secure a life-estate in the homestead owned by his wife, verbally promises to relinquish his claim to all other interest in her property, and she, in consideration of that promise, undertakes to vest such life-estate in him, the agreement is valid and may be carried into effect by will, and a family settlement after her death. *Ib.*
3. *Same.—Contract.—Equitable Consideration.—Debtor and Creditor.*—In such case, an equitable consideration is sufficient to uphold the contract of the husband, and he may perform it, notwithstanding the objections of his creditors. *Ib.*
4. *Same.—Parol Partition.*—A parol partition of lands, where possession is taken or retained under the agreement of partition, is valid, and the principle that governs such partition applies to family settlements. *Ib.*
5. *Contest of.—Trial by Jury.*—The provisions of section 409, R. S. 1881, providing for trial by the court of causes which were of exclusive equitable jurisdiction prior to June 18th, 1852, do not apply to a proceeding to contest a will, which is of statutory creation, and in such proceeding there is a right to a trial by jury. *Lamb v. Lamb, 456*
6. *Same.—Mental Capacity of Testator.—Witnesses.*—Sections 498 and 499, R. S. 1881, do not prohibit the parties, in a proceeding by heirs to set aside a will, from testifying as to facts relating to the mental capacity of the testator, although his executor be a party to the action. *Ib.*
7. *Same.—Erroneous Statement in Will as to Advancements.—Evidence.*—For the purpose of showing the mental condition of the testator, evidence that the statements in the will that he had advanced the sums designated to the parties named are erroneous, is admissible. *Ib.*
8. *Same.—Rational Disposition of Property.—Presumption.*—If a testator has made a rational disposition of his property, no presumption of unsoundness of mind can be drawn from the fact that the distribution is unequal. *Ib.*
9. *Same.—Unequal or Unnatural Disposition of Property.*—Inequality or injustice in the disposition of his estate is a circumstance which may be considered, with other circumstances, on the subject of the testator's mental capacity. *Ib.*
10. *Same.—Prior Declaration of Intention.*—Where, prior to making his will and while in good health, the testator declared his intention to dispose of his property substantially as disposed of in the will, such fact tends to support the will. *Ib.*
11. *Same.—Loss of Memory.—Testamentary Capacity.*—The loss of memory destroys testamentary capacity. *Ib.*
12. *Same.—General Verdict.—Sufficient when Covers Issues.*—Where a general verdict covers all the issues and supplies a foundation for such a judgment as the law prescribes, nothing more than a general verdict is required. *Ib.*
13. *Construction.—Intention.—Evidence.*—In the construction of a will, it is the duty of the court to ascertain the intention of the testator, but this must be shown in some way by the will itself, and not wholly by outside facts. *Pugh v. Pugh, 558*
14. *Same.—Word "Children" Does not Signify "Grandchildren."*—Where a bequest is given by will to the children of a person, the word "children" must be understood in its primary signification, where there

are persons living at the date of the will, or when the bequest takes effect, answering such meaning of the term, and in such case it will not include grandchildren. *Ib.*

WITNESS.

See CRIMINAL LAW, 24, 37, 38, 40; INSTRUCTIONS TO JURY, 2; WILL, 6.

WORDS AND PHRASES.

See INTOXICATING LIQUOR, 6; STATUTE OF LIMITATIONS, 1; TELEPHONE, 5, 6; WILL, 14.

WRITTEN INSTRUMENT.

See CONTRACT, 19; PLEADING, 4, 5.

END OF VOLUME 105.

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